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#### STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 16 EDC 05089

COUNTY OF WILSON

by and through his parents and Petitioner,	FINAL DECISION
v.	FIVAL DECISION
Wilson County Schools Board Of Education Respondent.	

**THIS MATTER** was heard before the Honorable Stacey B. Bawtinhimer Administrative Law Judge, presiding, on September 27-30, November 1-4, November 8-9, November 22-23, December 5-9, 16, 19-22, 2016, as well as January 4-5, 12-13, 17-18, 2017 at the Office of Administrative Hearings in Raleigh, North Carolina and the Wilson County School Board Offices in Wilson, North Carolina.

After hearing the evidence presented and considering the written and oral arguments of counsel, the Undersigned has concluded that Respondent ("Wilson County Schools," "Respondent," or "WCS") provided Petitioner with a free appropriate public education ("FAPE") from December 16, 2014 through June 2015 and made an appropriate education available to through his IEP which expired on January 19, 2016. However, from August 24, 2015 to October 23, 2015, the Respondent failed to provide access to his non-disabled peers, failed to give the Petitioners an appropriate Prior Written Notice at the June 9, 2015 IEP meeting, and failed to implement a material portion of his speech language therapies thereby denying a FAPE for those violations.

## **APPEARANCES**

**For Petitioners:** Stacey M. Gahagan

Stella Kreilkampf (withdrew Nov. 3, 2016)

The Gahagan Law Firm, P.L.L.C.

3326 Durham Chapel Hill Boulevard, #210-C

Durham, NC 27707

**For Respondent:** Rachel B. Hitch

Kristopher L. Caudle

Schwartz & Shaw, P.L.L.C.

19 West Hargett Street, Suite 1000

Raleigh, NC 27601

## **WITNESSES**

### **For Petitioners:**

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2nd grade teacher in the Pitt County Schools (2010-11 school year)
Ph.D., Expert Witness

mother of

5th grade teacher (Spring of 2015 WCS)
6th grade teacher (Fall of 2015 WCS)
CCC/SLP, Private Speech Therapist ("Let's Talk")
Program Coordinator at
Ph.D. private psychologist
CCC/SLP,
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## For Respondent:

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Ph.D., Expert Witness

CCC/SLP, Speech Pathologist

CCC/SLP, Speech Pathologist

Occupational Therapist

Occupational Therapist

Expert Witness and str 3rd and 5th grade teacher
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## EXHIBITS ADMITTED INTO EVIDENCE

The following exhibits were received into evidence during the hearing. The page numbers referenced are the "bates stamped" numbers.

Stipulated Exhibits Admitted at Hearing (hereafter Stip. Ex. 1, Stip. Ex. 2, etc.):

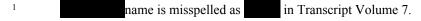
Stip. Exs. 1-25, 28-33, 36, and 38-39.

**Petitioners' Exhibits Admitted at Hearing** (hereinafter Pet. Ex. 1, Pet. Ex. 2, etc.):

Pet. Exs. 2, 4-5, 10-11,13-21, 24-25, 27-30, 32, 33, 34 (pages 898-904), 36, 43,49-52, 61-62, 66, 68-69, 72-74, 106, 112, and 116-120.

Respondent's Exhibits Admitted at Hearing (hereinafter Res. Ex. 1, Res. Ex. 2, etc.):

Res. Exs. 2, 13, 17-19, 21-24, 27-33, 36-39, 41, 44-45, 47, 50-52, 58-60, 63, 65-68, 70, 73-81, 83-84, 97-98, 101-102, 105, 107-110, 112, 114-116, 120-121, 135, 141, 146-147, 154, 156-166, 169-170, 172-175, 179, 193, 198, 202, 239, 243, 244, and 248-253.



<sup>&</sup>lt;sup>2</sup> is a medical doctor and referenced in the transcript as both this Final Decision she is referred to as

## Offers of Proof:

Petitioners: Tr. vol. 3, pp. 585:11-587:2; vol. 25, pp. 5227:12-5230:4; vol. 28, pp.

5822:3-5823:13.

Respondent: Tr. vol. 5654:7-5659:19.

#### **Official Notice:**

The Undersigned took official notice of the fact that is not on the North Carolina Department of Public Instruction's approved non-public school list for the provision of special education and related services to children with disabilities. Tr. vol. 28, p. 5873:8-14.

### PROCEDURAL BACKGROUND

On December 14, 2015, Petitioners filed a *pro se* Petition for a Contested Case Hearing (15 EDC 9757) ("Original Petition"), alleging violations of the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400 et seq. ("IDEA"), and North Carolina State law N.C. Gen. Stat. §§ 115C-109.6 *et seq.* Stip. 42. Soon thereafter on December 16, 2015 and after service to WCS, Petitioners voluntarily dismissed without prejudice their Original Petition. Stip. 43. The Office of Administrative Hearings ("OAH") closed the Petition for Contested Case Hearing at 15 EDC 09757 on January 6, 2016. Stip. 44.

Less than one-year later, on May 17, 2016, Petitioners refiled their Original Petition as an attachment to a second Petition (16-EDC-5089) ("May 2016 Petition"). Stip. 45. The May 2016 Petition contained additional allegations and supplemental allegations. The Respondent and Petitioners filed Motions for Partial Summary Judgment on August 17, 2016 and June 24, 2016 respectively. The Respondent also filed a Partial Motion to Dismiss.

The case had previously been reassigned to the Undersigned on August 8, 2016 to which the Respondent objected and on August 22, 2016, the Respondent filed a Motion to Recuse. After considering written and oral argument, the Undersigned denied the Respondent's Motion to Recuse and remained assigned to the case. *See* Order Denying Respondent's Motion to Recuse dated 09/06/2016.

Subsequently, after a hearing on the parties' partial summary judgment motions on September 7, 2016, the Undersigned denied both motions finding that multiple material and factual issues were still in dispute by the parties in the case. The Undersigned did, however, grant Respondent's partial motion to dismiss and dismissed with prejudice all of Petitioners' claims and causes of action arising or occurring prior to December 16, 2014, in either the Original Petition or the May 2016 Petition. *See* Order Denying Respondent's Motion for Partial Summary Judgment and Order Granting Respondent's Partial Motion to Dismiss both dated 09/07/2016

A Contested Case hearing on Petition 16-EDC-05089 was commenced in the Office of Administrative Hearings ("OAH") on September 27, 2016 with the Undersigned presiding. The Petitioners' case-in-chief began on September 27, 2016 and continued during additional hearing dates on September 28-30, November 1-4, November 8-9, November 22-23, and December 5-8, 2016.

On January 4, 2016, upon reconsideration, the Undersigned entered an interim Order Granting Respondent's Motion for Partial Summary Judgment, dismissing with prejudice all claims or causes of action in the May 2016 Petition from January 20, 2016 to May 17, 2016 for lack of subject matter jurisdiction.

On December 8, 2016, Petitioners rested their case-in-chief and Respondent moved for the involuntary dismissal of some of Petitioners' claims pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. After allowing Petitioners an opportunity to respond and after reviewing the records, the Undersigned held a motion's hearing on Respondent's Rule 41(b) motion and verbally dismissed the following portions of the Petitioners' claims. This verbal order was memorialized in a written Order dated March 17, 2017 which dismissed the following claims:

- 1. A denial of FAPE based on a reduction of speech therapy sessions from thirty-six (36) sessions per reporting period to thirty-three (33) sessions per marking period;
- 2. A denial of FAPE based on the absence of a regular education teacher during the January 20, 2015 and June 9, 2015 IEP meetings;
- 3. A denial of FAPE based on a failure to consider ESY services;
- 4. A denial of FAPE based on WCS' failure to utilize to conduct trainings or implement a verbal behavior program of data collection or progress monitoring;
- 5. A denial of FAPE based on WCS' use of as an augmentative communication device;
- 6. A denial of FAPE based on a lack of meaningful parent participation in the development of s January 20, 2015 and June 9, 2015 IEP meetings, excluding the LRE issue, including any claim that WCS denied a FAPE by his placement on the extended content standards and the NC EXTEND 1 alternative assessment;
- 7. A denial of FAPE based on the pre-determination of Setting; splacement in the Separate Setting;
- 8. Reimbursement for private in-home therapy sessions provided by BCPS from November 9, 2016 through January, 2016; and
- 9. To the extent that Allegation No. 72 in the Petition formed the basis of any claim, the date of this allegation was outside of this Tribunal's defined statute of limitations of December 16, 2014, and is also dismissed with prejudice.

- 10. Claims regarding Respondent's failure to provide information to see substitute of limitations and have been previously dismissed, and
- 11. Claims regarding the failure to allow the parent to participate in the development of the January 20, 2015, IEP related to the assignment of to the adaptive curriculum are outside the jurisdiction of the Office of Administrative Hearings.

Because of the application of the statute of limitations (which barred claims prior to December 16, 2014) and a lack of subject matter jurisdiction for claims arising after January 19, 2016, the operative time period for Petitioners claims was from December 16, 2014 through January 19, 2016. Because was withdrawn from WCS, no due process claim was pending, and his last IEP expired on January 19, 2016, the Undersigned also dismissed any claims for private tuition reimbursement after January 20, 2016. After January 20, 2016, was a parentally placed private student without a FAPE at issue and subject to a Student Services Plan under 20 U.S.C. § 1412(a)(10)(A)(i) and 34 C.F.R. § 300.132 (b) but not an IEP. Except for "child find" issues which were not raised by the May 2016 Petition, this Tribunal lacked subject matter jurisdiction over any claims after January 20, 2016.

All findings of fact and conclusions of law stated in the prior Orders of this Tribunal are incorporated by reference as if fully stated herein.

# ISSUES REMAINING AFTER RULING ON RESPONDENT'S MOTION TO DISMISS

I.	Whether Respondent provided a FAPE based on the January 14, 2014 IEP a
	amended on February 27, 2014 (collectively the "January 2014 IEP") from December
	16, 2014, through January 19, 2015, a period of sixteen (16) school days ("January 2016)
	IEP FAPE" issue);

- II. Whether Respondent provided with a FAPE based on the January 20, 2015 IEP as amended June 9, 2015 (collectively the "January 2015 IEP") from January 20, 2015, through January 19, 2016 ("January 2015 IEP FAPE" issue);
- III. Whether had appropriate access to non-disabled peers from August 24, 2015 through October 23, 2015 ("LRE" issue);
- IV. Whether Respondent failed to properly implement s related services between December 16, 2014, and January 19, 2016 and, if so, whether this failure caused educational harm ("Related Services" issue);
- V. Whether Respondent failed to conduct required evaluations of from December 16, 2014, and January 19, 2016 and, if so, whether this failure caused educational harm ("Evaluation" issue);

- VI. If Respondent denied a FAPE, whether the private placement chosen by Petitioners from October 23, 2015 through January 19, 2016 was appropriate ("Private Placement" issue); and,
- VII. To what remedies, if any, are Petitioners entitled?

### **BURDEN OF PROOF**

Petitioners acknowledged in the Order on the Final Pre-Trial Order Conference entered on September 27, 2016, that they have the burden of proof in this contested case. The standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). Black's Law Dictionary defines "preponderance" as denoting "a superiority of weight or outweighing." The finder of fact cannot properly act upon the weight in favor of the one having onus, unless it overbears, in some degree, the weight upon the other side. North Carolina statutes state that the actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide with a free appropriate public education.

## **STIPULATIONS**

- 1. Prior to the hearing, the parties agreed to Stipulations of Fact in the Order on the Final Pre-Trial Conference ("Order on Pre-trial") filed on September 27, 2016. An Amended Order on the Final Pre-Trial Conference ("Amended Order on Pre-Trial") was filed on April 24, 2017 which included additional stipulations made by the parties during the contested case hearing. To the extent that Stipulations are not specifically stated herein, the Order and Amended Order on Pre-Trial are incorporated fully herein by reference.
- 2. The Jurisdictional, Party and Legal Stipulations are incorporated in the Conclusions of Law *infra*. Rather than being restated here, some of the factual stipulations are also incorporated in the Findings of Fact and Conclusions of Law as applicable. For cohesion, some facts are combined and comments are included by the Undersigned for clarity of the relevant IEPs and time frames within this case.
- 3. Petitioner s date of birth is June 6, 2003 and that his father is Petitioner was twelve (12) years old at the time of the filing of this petition. Stip. 9.
- 4. is a "child with a disability" as that phrase is defined in IDEA determined eligible for services under the IDEA. Stips. 10 & 13. has been diagnosed with autism, receptive and expressive language disorder, and seizure disorder. Stip. 14.
- 5. is domiciled within the boundaries of the Wilson County Schools ("WCS"), and he resides with his parents at Carolina. Stips. 11 & 12.

- 6. was enrolled in the Pitt County Schools ("PCS") from 2006 through 2012. Stip. 15. The PCS conducted a Preschool Educational Evaluation of on June 5, 2006. Stip. 16. The PCS determined met the eligibility category for Autism as his primary eligibility category on June 15, 2006. Stip. 17.
- 7. and his family moved from Pitt County to Wilson County at the beginning of the 2012-13 academic year. Stip. 18.

# 8. attended:

2012-13	Third Grade		

Stip. 19.

- 9. An Annual Review IEP Meeting was held on February 20, 2013, Addendum IEP Meeting was held on March 26, 2013 and a Reevaluation IEP Meeting was held on October 24, 2013, and the documents from those meetings speak for themselves. Stips. 20-22.
- 10. administered the Verbal Behavior Milestones Assessment and Placement Program ("[2013] VB-MAPP") to on December 10, 2013, and the evaluation report from that assessment speaks for itself. Stip. 23.
- 11. A Facilitated Annual Review IEP Meeting was held on December 17, 2013, and a Facilitated Reevaluation and Addendum IEP Meeting was held on January 14, 2014, the documents from those meetings speak for themselves. Stips. 24 & 25.
  - 12. WCS conducted a Speech/Language Evaluation of on February 11, 2014. Stip. 26.
- 13. administered the Kaufman Speech Praxis Test for Children to February 11, 2014, and the report for that assessment speaks for itself. Stip. 27.
- 14. A Reevaluation and Addendum IEP Meeting was held on February 27, 2014, and the documents from that meeting speak for themselves. Stip. 28.
- 15. The January 14, 2014 IEP, with duration dates 01/14/14-12/16/14, and as amended on February 27, 2014 (collectively the "January 2014 IEP") is the first disputed IEP within the applicable statute of limitations. During the applicable period from December 16, 2014 to October 23, 2015, the January 2014 IEP was implemented for only sixteen (16) school days. Stip. 50.
  - 16. attended ESY during the summer of 2014 in accordance with his IEP. Stip. 29.
- 17. An Annual Review IEP Meeting was held on January 20, 2015, and the documents from that meeting speak for themselves. Stip. 30.

- 18. The WCS evaluated s fine motor/gross motor skills on March 4, 2015, using the Bruininks-Oseretsky Test of Motor Proficiency and clinical observation, and the results report from the assessment speaks for itself. Stip. 31.
- 19. obtained the following scores on the fifth grade NC EXTEND1 EOG for the 2014-15 school year:

Reading	3
Math	3
Science	4

Stip. 32.

- 20. A Reevaluation and Addendum IEP Meeting was held on June 9, 2015, and the documents from that meeting speak for themselves. Stip. 33.
- 21. The amendments the IEP team made to s IEP at the IEP Meeting held on June 9, 2015, were to go into effect on August 24, 2015. Stip. 34.
- 22. was steacher during the 2015-16 school year at Stip. 35.
- 23. No IEP Meetings were held after October 23, 2015, through the date of the Petition, May 17, 2016. Stip. 36.
  - 24. is located at . Stip. 37.
- 25. administered the VB-MAPP to on December 1, 2015 ["2015 VB-MAPP"], and that the report of the results from that assessment speaks for itself. Stip. 38.
- 26. administered the VB-MAPP to on May 1, 2016 ["2016 VB-MAPP"], and that the report of the results from that assessment speaks for itself. Stip. 39.
- 27. Dr. of Dogwood Psychology Center for Children and Families administered a psychological evaluation to on April 6, 2016. Stip. 40.
- 28. The WCS subpoenaed educational records from 2016. Stip. 41.
- 29. Any documents produced by the school district in discovery including, but not limited to, IEPs, email correspondence, data sheets, and meeting notes, are self-authenticated. Stip. 46.
- 30. All pleadings filed with the Office of Administrative Hearings on the matter associated with Docket No. 16 EDC 05089 are self-authenticated. Stip. 47.

- 31. The North Carolina Department of Instruction's Policies Governing Services for Children with Disabilities is self-authenticated. Stip. 48.
- 32. The North Carolina Department of Public Instruction's 2008-2009 Guiding Practices: Implementing Policies Governing Services for Children with Disabilities is self-authenticated. Stip. 49.
- 33. There were sixteen (16) school days from December 14, 2014 until January 20, 2015 during the 2014-15 academic year. Tr. vol. 23, pp. 4876:17-4878:2. Stip. 50.
- 34. Petitioners are not seeking reimbursement for the services rendered by BCPS. Tr. vol. 28, p. 5855:2-16. Stip. 51.
- 35. Petitioners are not seeking reimbursement for the attendance of at the January 20, 2015 IEP meeting. Tr. vol. 28, p. 5859:3-15. Stip. 52.

## FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding along with the parties' Proposed Final Decisions, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case including, but not limited to, verbal statements at IEP meetings, the IEP minutes, the IEP documents, the DEC 5/Prior Written Notices, and all other competent and admissible evidence.

## **Introduction of Case**

1. When the layers of testimony and evidence are peeled back, the central issue of this case concerns the appropriateness of the January 2015 IEP as amended. All other issues were ancillary. Historically, the parties' relationship had soured from the outset and was fraught with misunderstandings and divergent expectations. The Petitioners' preferred methodology was Verbal Behavior Analysis ("VBA") a form of Applied Behavior Analysis ("ABA") therapy. Although some components of VBA were utilized by Wilson County Schools, the relevant IEPs do not specifically reference or require exclusivity to VBA therapy.

2. Dissatisfied with WCS' educational program at enrolled in a private school which used 1:1 VBA therapy as its sole treatment plan for In addition to alleging the relevant IEP's denial of a FAPE to Petitioner seeks reimbursement for the private school programs and compensatory services.

### **Relevant IEPs:**

3. This case involves only two IEPs with their respective amendments. The relevant IEPs are:

January 2014 IEP: Drafted January 14, 2014, amended February 27, 2014 (collectively

referred hereafter to as the "January 2014 IEP"), duration dates 01/14/14-12/16/14, extended by request of the Petitioners to January 20, 2015 because of an unexpected out-of-state funeral. Petitioners are not challenging the tardiness of this IEP meeting or the extension of the

January 2014 IEP. Stip. Exs. 10 & 11.

January 2015 IEP: Drafted January 20, 2015, amended June 9, 2015, duration dates 01/20/15

01/19/16, (collectively hereinafter referred to as the "January 2015 IEP").

Stip. Exs. 12 & 13.

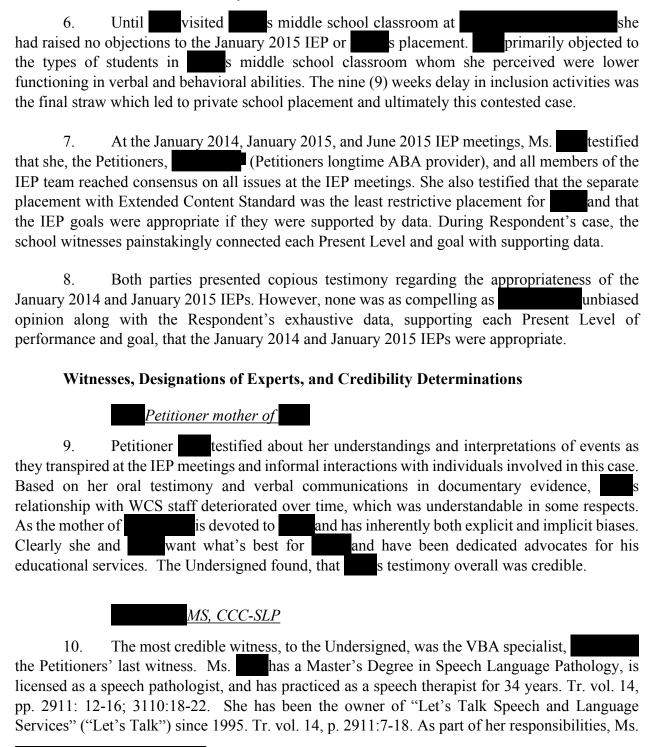
Relevant Time Period: The relevant time period for the case is December 16, 2014 to January 19, 2016.

## **OVERVIEW OF IEP'S**

## January 2014 IEP

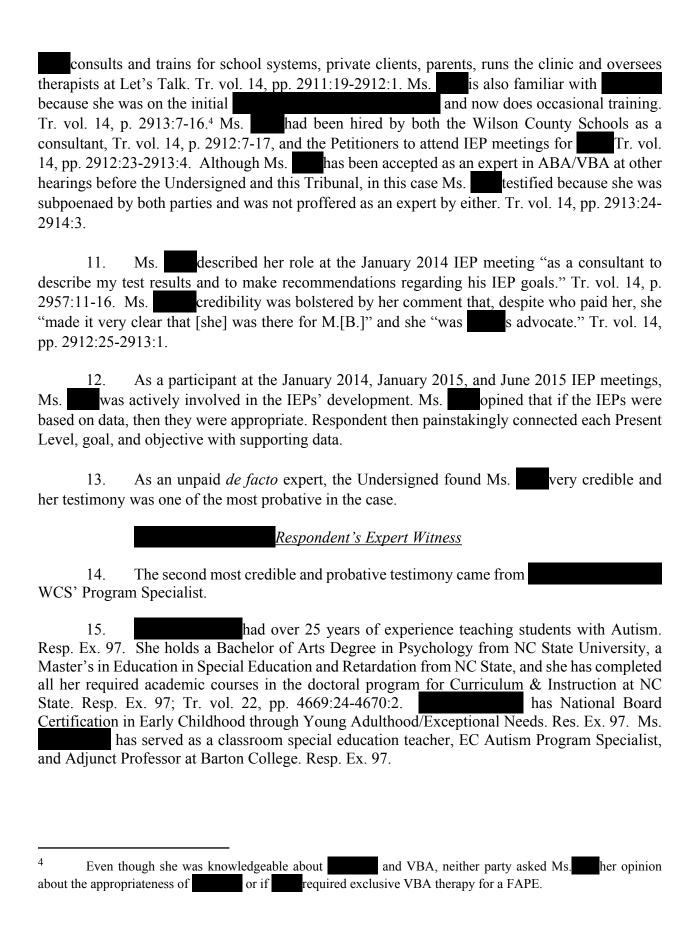
- 4. All claims prior to December 16, 2014 were dismissed by the Undersigned on September 7, 2016. See Order Granting Respondent's Partial Motion to Dismiss. As such, the January 2014 IEP was implemented approximately sixteen (16) days before the development of the January 2015 IEP. Stip. 50. With respect to the January 2014 IEP, Petitioners complained primarily about the change in placement from resource to separate. See Petition pp. 13-16; ¶¶ 89, 90, 92, 93, 94, 95 & 96. Petitioners also contested the appropriateness of a writing goal and functional goal. See Petition p. 14, ¶91. At the February 27, 2014 IEP Addendum meeting, the IEP team added a language goal for secently diagnosed apraxia and changed his testing from NCExtend 2 to NCExtend 1. See Petition p. 16, ¶103.
- 5. Petitioners argued that the January 2014 IEP was inappropriate due to general lack of educational progress from 2013-2015 and that the goals from 2013-2015 decreased in rigor. *See* Petitioners' Trial Brief pp. 2, 6-18. Many of Petitioners' complaints about placement, and appropriateness of goals precede the statutory period before this Tribunal. Petitioners presented no evidence that the January 2014 IEP, extended for an additional 16 days at the parents' request, caused educational harm to

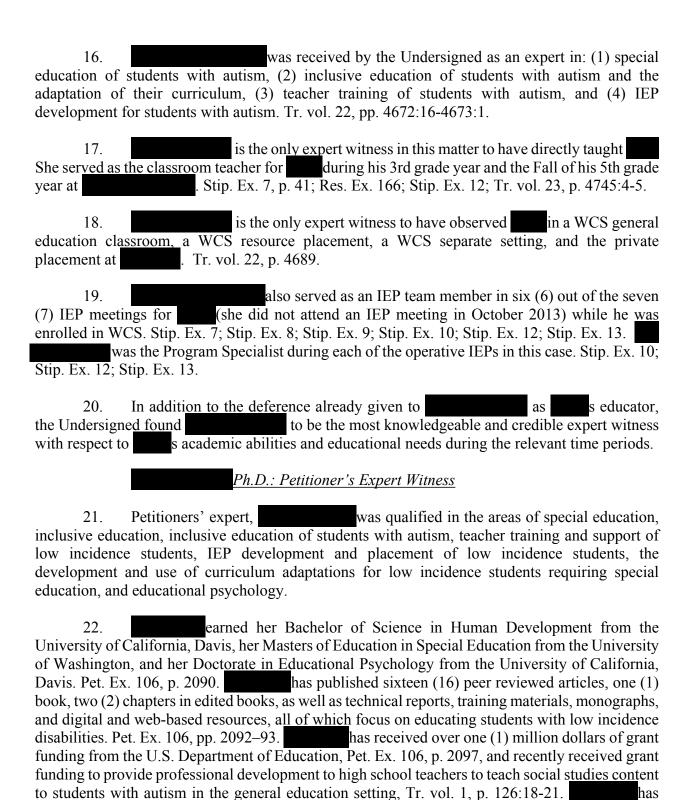
## **January 2015 IEP and Amended June 2015 IEP**



name is misspelled in portions of the transcript and exhibits as

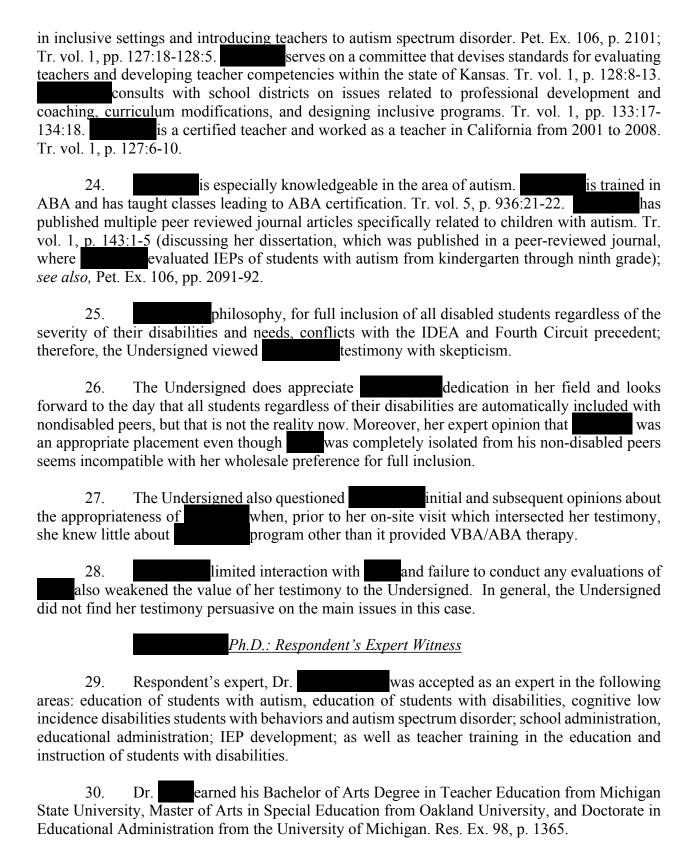
provided ABA services to for eight (8) years prior to his full-time enrollment at

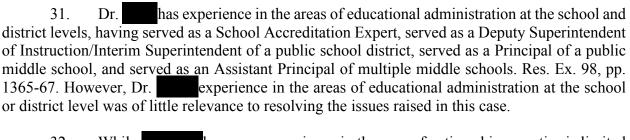




23. has served as an assistant professor in the Department of Special Education at the University of Kansas since 2013. Pet. Ex. 106, p. 2090. As part of her teaching responsibilities, teaches courses on preparing teachers to develop and implement IEPs

presented at over sixty (60) conferences on educating students with disabilities. See Pet. Ex. 106.





- when compared to Petitioners' expert, Dr. Serves as a Graduate Autism Spectrum Disorder Coordinator at Eastern Michigan University. Res. Ex. 98, p. 1366. Dr. Completed supplementary training on Autism Spectrum Disorder, specifically, the Michigan Test for Teacher Certification Developer. Res. Ex. 98, p. 1365; see also, Tr. vol. 16, p. 3415:18-25 (discussing the autism state test).
- 33. Dr. testimony regarding the development of s IEPs and supporting data along with his opinions about s potential rate of progress held the greatest weight to the Undersigned. Otherwise, Dr. testimony held little value except to corroborate the testimonies of and Ms.

## Other Witnesses:

34. Unless otherwise specifically noted in the Findings, the Undersigned found the remainder of the witnesses to be credible.

## Special Matters Outside the Statutory Period

- 35. transferred from Pitt County Schools ("PCS") to Wilson County Schools ("WCS") in August 2012. Soon after stransfer to WCS, his educational programming was impacted by the failure of WCS to implement, for several months, his IEP from PCS.
- 36. As a result, WCS offered compensatory services during the summer of 2013 and more compensatory hours were negotiated during the 2013-2014 school year.
- 37. A Compensatory Services Schedule Agreement ("Compensatory Services Agreement") for 744 compensatory academic and 35 speech hours was signed by a sparents and WCS on April 29, 2014. Pet. Ex. 22; see Ex. A. to Barnes Aff. (filed January 24, 2017).
- 38. Based on this Compensatory Services Agreement, received academic and speech compensatory services during the summers of 2013 and 2014, academic compensatory services during the 2014-2015 school year, and academic compensatory services during the summer of 2015.
- 39. This Compensatory Services Agreement is only relevant with respect to the implementation of the related services.

# s UNIQUE NEEDS/CIRCUMSTANCES

# Unique Circumstances for Relevant to Determining the Appropriateness of January 2014 and January 2015 IEPs.

40. *Endrew F*. requires an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The initial inquiry is what were surjusted unique needs/circumstances at the time the relevant IEPs were developed? *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017).

# **Enjoyed Interactions with Non-Disabled Peers**

Both parties agreed that, when provided the opportunity to interact with his non-disabled peers, enjoyed and benefited from this interaction. Stip. Ex. 7, p. 20. According to Ms. speer interaction at lunch was "terrific for pairing peers with reinforcement. They clearly care for and it's a positive experience for him." Res. Ex. 114, p. 1568 (10/14/14 Observation at speers"). The IEP team agreed that seeingly times with his peers" and "has good behavior in [the regular] class." Stip. Ex. 7, p. 42. He did "well with inclusion experiences." Stip. Ex. 7, p. 40. Moreover, that seeingly the second politic student. He loves to be active and with his peers." Stip. Ex. 10, p. 93.

# was Not on Grade Level Curriculum

### Extended Content Standards

42. was not on grade level with his academic skills and was instructed on the Extended Content Standards. The appropriateness of this course of study was uncontested at the hearing. Even Petitioner's expert, opined that the Extended Content Standards and NC EXTEND 1 were appropriate for Tr. vol. 1, p. 185, vol. 5, p. 990:18-22 (testimony of Tr. vol. 14, pp. 3185-3186:3 (testimony of

# NC EXTEND 1 ("EXTEND 1") Alternative Assessment.

- 43. As of January 20, 2015, was being instructed on the Extended Content Standards and assessed on the EXTEND 1, which by its very terms is only applicable to students with severe and pervasive delays in functioning. Stip. Ex. 11, p. 166; Stip. Ex. 12, p. 210.
- 44. The EXTEND 1 is the alternative assessment based on alternative achievement standards that is permitted for the 1% of disabled students who are the lowest functioning students in a school system. Stip. Ex. 36; Tr. vol. 1, pp. 213-216; see also, Stip. Ex. 1.

- 45. had previously been on the Extended Content Standards in Pitt County Schools, Tr. vol. 1, p. 71:24-72:1 (testimony of also deemed the EXTEND 1 to be appropriate for See Stip. Ex. 11, pp.166, 186 (February 27, 2014 amendment to January 2014 IEP); Tr. vol. 6, p. 1121 (
- 46. To be eligible for the EXTEND 1, the student must have a current IEP, be enrolled in grades 3-8, 10 or 11, be instructed in the North Carolina Extended Content Standards, and "exhibit severe and pervasive delays in ALL areas of conceptual, linguistic and academic development as well as in adaptive behavior areas, such as communication, daily living skills, and self-care." Stip. Ex. 36 (capitalization in original).

# s VB-MAPP Scores, IQ Score, and Adaptive Behavior Scores Are Consistent with the Criteria for the Extended Content Standard.

was significantly delayed in linguistics, academics, adaptive behavior, communication, daily living skills, and self-care. Tr. vol. 14, pp. 3185: 17-25, 3186:1-3 (testimony of Tr. vol. 1, p. 185; Tr. vol. 5, p. 990:18-22 ; *see also*, Res. Ex. 2.

VB-MAPP Scores: Functional Skills Less than 48 Months.

- 48. The Verbal Behavior Milestones Assessment and Placement Program ("VB-MAPP") was conducted by for WCS in December 2013 just before the facilitated January 2014 IEP meeting. Stip. Ex. 3. The VB-MAPP is an assessment of 170 measurable learning and language milestones that are sequenced and balanced across three developmental levels: Level 1 (0-18 months), Level 2 (18-30 months), and Level 3 (30-48 months). Stip. Ex. 3, p. 4.
- 49. The VB-MAPP assessment is "more functional rather than academic in its results," Stip. Ex. 10, p. 136, and is not aligned with the North Carolina academic curriculum. Tr. vol. 15, p. 3234:12-16 (testimony of The results of the VB-MAPP and the recommendations from the VB-MAPP were the focus of the facilitated January 2014 IEP meeting. Stip. Ex. 10, p. 136.
- 50. According to the December 2013 VB-MAPP assessment ("2013 VB-MAPP"), had not mastered all the skills at the 0-18 month level in mands, independent play, spontaneous vocal behavior. Stip. 3, pp. 2030-2032. had also not mastered all the skills at the 18-30 month range for tacts, listener responding/receptive, social, listener responding by function, feature and class, intraverbal, and linguistic structure. Stip. 3, pp. 2030-2032. Overall on the December 2013 VB-MAPP, had not reached the top level on any skill areas except for motor imitation, reading, writing, and he demonstrated 3/5 skills at the highest level in math.
- 51. In summary, based on the 2013 VB-MAPP scores, when was 10 years, 4 months old, he was functioning at a developmental age of less than 48 months.

# IQ Testing and Adaptive Behavior Scores: Non-Verbal IQ 49

19 Testing and Adaptive Behavior Scores. Won-verbul 19 49
52. In their original Petition (15 EDC 9757, filed 12/14/2015), Petitioners contended that splacement on the Extended Contents Standards curriculum was inappropriate because his intelligence had not been evaluated. Approximately a month before refiling their Petition (05/17/2016), on April 6, 2016, Petitioners obtained an independent psychological evaluation, conducted by Ph.D., which corroborated that had significant cognitive deficits.
53. At 12 years, 10 months of age, some some some some some some some was a 49,5 which was consistent with the cognitive testing from preschool. Resp. Ex. 2, pp. 1& 9.
observations, a review of servation of the Leiter International Performance Scale-3rd Edition, ( ) the Vineland Adaptive Behavior Scales-2nd Edition ("VABS-II"), Autism Diagnostic Observation System-2nd Edition ("ADOS-2"), Child Behavior Checklist Ages 6-18 Years ("CBCL"), and a Social Responsiveness Scale-2nd Edition ("SRS-2"). Resp. Ex. 2, p. 6; see also, Stip. Ex. 2.
Vineland scores for the aprix Both the Adaptive Behavior Composite Score from the and the score from the aprix fell in the "Low Range" (Resp. Ex. 2, p. 10), which, according to Dr. was the "lowest characterization that's available on the Vineland." Tr. vol. 13, pp. 2758:24-2759:4; Resp. Ex. 2, pp. 9-11; Tr. vol. 24, pp. 4948-4957; Stip. Ex. 2.
56. Other than swritten communication skills which were scored at a 6th grade level, all of so other adaptive skills were equivalent to a 4.7 year-old or younger which was consistent with his IQ (49), VB-MAPP scores (48 months or less), and WCS' prior determination that had significant cognitive deficits. Tr. vol. 13, pp. 2759:24-2760:2 (testimony of testing was consistent with WCS' determination that should be educated on the Extended Content Standards.
Brigance Testing: Below Grade Level in Reading and Math
57. The Brigance testing administered by WCS teachers over several years indicated that, even with modifications to the tests, was not on grade level in reading or math. Stip. Ex. 17; Stip. Ex. 18; Stip. Ex. 11; Stip. Ex.12, pp. 200, 204, 225. was performing below his grade level, but higher in some respects, math and sight words, than his non-verbal IQ ability level. Tr. vol. 13, pp. 2765:25-2766:7 (testimony of Dr.
58. For example, school witnesses testified during Petitioners' case-in-chief that was reading at about a second-grade level when he was in the 5th grade. Tr. vol. 24, pp. 5117, 5121, 5572 (testimony of pp. 1951:11-14, 1955, vol. 12, p. 2605 (testimony of Likewise, the 2013 VB-MAPP indicated that had developed "some nice strong

Average composite score falls between 85-115. Res. Ex. 2, p. 9.

functional academic skills". Stip. Ex. 3, p. 9. Although had some strengths, by every measure introduced at the hearing, had significant impairment in all domains.
was Nonverbal with Verbal Apraxia and Required an Augmentative Communication Device ("AAC device")
59. The most "significant" concern noted by Ms. in the 2013 VB-MAPP assessment was "lack of spontaneous communication which will require intensive services by the SLP [speech language pathologist]." Res. Ex. 3, p. 9. After the Kaufman Speech Praxis Test for Children was administered to he was diagnosed with verbal apraxia. Stip. Exs. 3 & 4.
60. In her 2013 VB-MAPP assessment, Ms. "highly recommended" a voice output system but [sic] used to allow s language to continue to grow while the SLP and teachers are building up his vocal speech production." <i>Id.</i> Ms. testified that needed to be taught a voice reply system so that the educators could accurately assess his knowledge. Tr. vol. 14, pp. 2937:15-2938:6.
61. At the January 2014 IEP meeting, Petitioner "voiced her concern that this device will become the primary means of communication for [ which she does not want." Stip. Ex. 10, pp. 137-138; see also, Tr. vol. 14, p. 2961:8-17 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant, was also "skeptical" of using an AAC device. Tr. vol. 1, p. 50:1-4 (testimony of Ms. his prior PCS teacher (2010-2011 school year) and summer camp assistant (2010-2011 school year) and school year (2010-2011 school year) and school year (2010-2011 school year) and year (2010-2011 sc
62. Despite this skepticism, an augmentative communication ( or ) and assistive technology devices were on strelevant IEPs. See Stip. Ex. 10, 11,

was using the

was enrolled in WCS. This assumption is supported by

device was "very effective" for and helped him to ask

not Wilson County

where the

However, instead of an AAC device, wanted "more intensive [speech]

Based on s "reluctance" to use the in school, it is doubtful that the

was first introduced at

After withdrawing from WCS, Petitioner voiced the same concerns

(his prior PCS teacher and summer camp assistant) who said that she

services." Stip. Ex. 10, p. 137. In response to services, at the January 2014 IEP meeting, speech therapy was increased from 14 sessions a reporting period to four sessions a week. *Compare* 

did not know used the device in WCS because she never saw him use the device while he

was enrolled in WCS or used it during summer camp. Tr. vol. 1, pp. 74:10-75:6. Ms.

Schools. Tr. vol. 1 p. 74:10-21. However, the summer of 2016 after senrollment in

regarding augmentative communication and assistive technology at

to leave situations instead of "tantrumming." Tr. vol. 1, pp. 49:25-50:10.

noted in her February 2014 observation that

class. Pet. 34, p. 900 (2/17/14 Teaching Procedure Training for 4 hours).

Stip. Ex. 9, p. 75 to Stip. Ex. 10, p. 115.

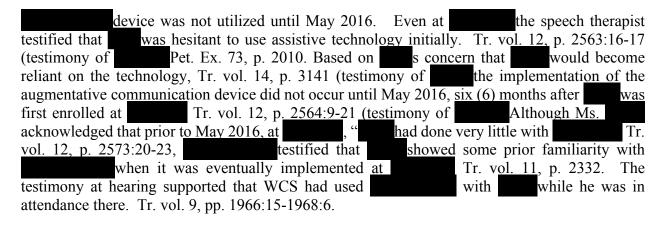
device was used in the home while

testified that the

64.

the testimony of Ms.

incorrectly assumed that the



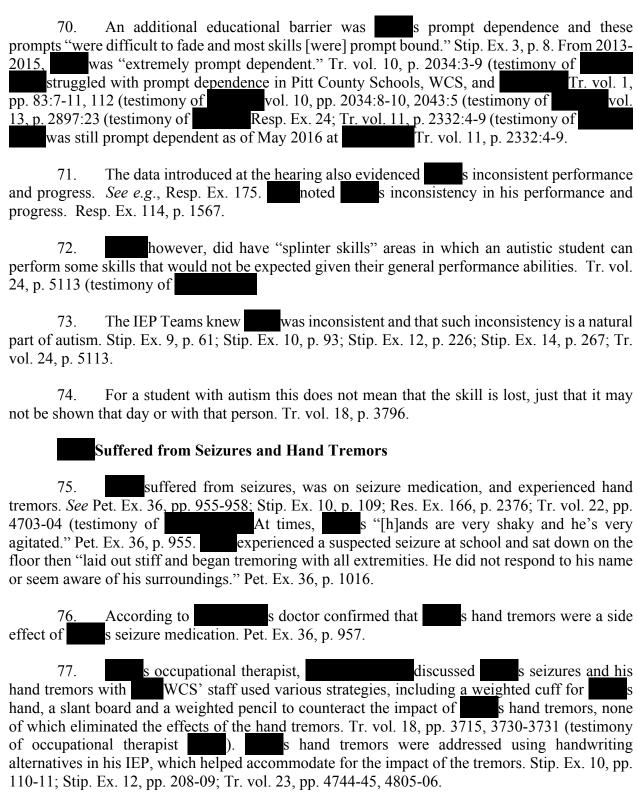
- 66. Despite s prior aversion to the device during s tenure at WCS. s ability to utilize an AAC device to communicate has played Petitioners now contend that " a critical role in his communication progress." See Pet. Proposed Decision, ¶348 (emphasis added) citing Tr. vol. 12, pp. 2567:7-9 (testimony of 2568:21-2569:14 (testimony of discussing sprogress using with spontaneous requests, requesting a larger variety of items, and requesting and responding to intraverbals); Tr. vol. 4, pp. 823:12-824:2 (testimony of Tr. vol. 2, p. 406:6-12, 407:3-19 (testimony of that was able to generalize the skill of communicating with his device to the home environment); Tr. vol. 5, pp. 891:18-22 ), 905:15-21 (testimony of describing demonstrating understanding of the grammar concept of a complete sentence); Tr. vol. 1, pp. 49:24-50:19 (testimony of
- 67. It is disingenuous for Petitioners to criticize WCS for a perceived lack of communication progress when Petitioners refused to embrace the home environment. Petitioners' decision in this regard stifled and WCS.

# was Unable to Generalize Skills, Was Prompt Dependent, and Inconsistent with Mastery of Skills

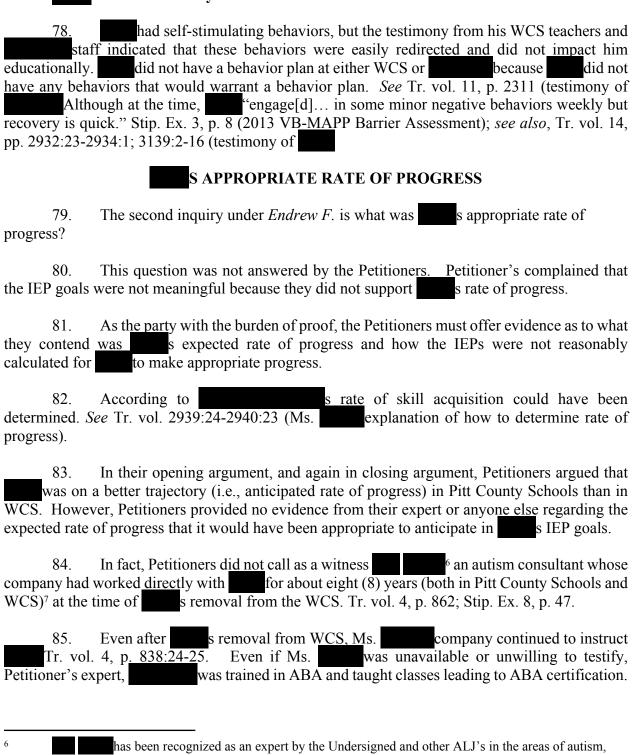
Unable to Generalize Skills

- 68. Generalization of skills is important for to function academically. Tr. vol. 17, p. 3694 (testimony of Dr. had a long history of difficulty generalizing in a new setting. Tr. vol. 23, p. 4879:4-6 (testimony of Failure to generalize skills to novel tasks was a significant barrier impeding academic progress, and often he lost his generalized skills. *See* Stip. Ex. 3, p. 8 (2013 VB-MAPP Barriers Assessment).
- 69. Although the Undersigned did not find testimony very creditable, she did admit that "had inconsistencies in his abilities to show skills," Tr. vol. 1, p. 70:6-13, and that could do things at home that he could not do at school. Tr. vol. 1, p. 70:14-22.

# Prompt Dependent

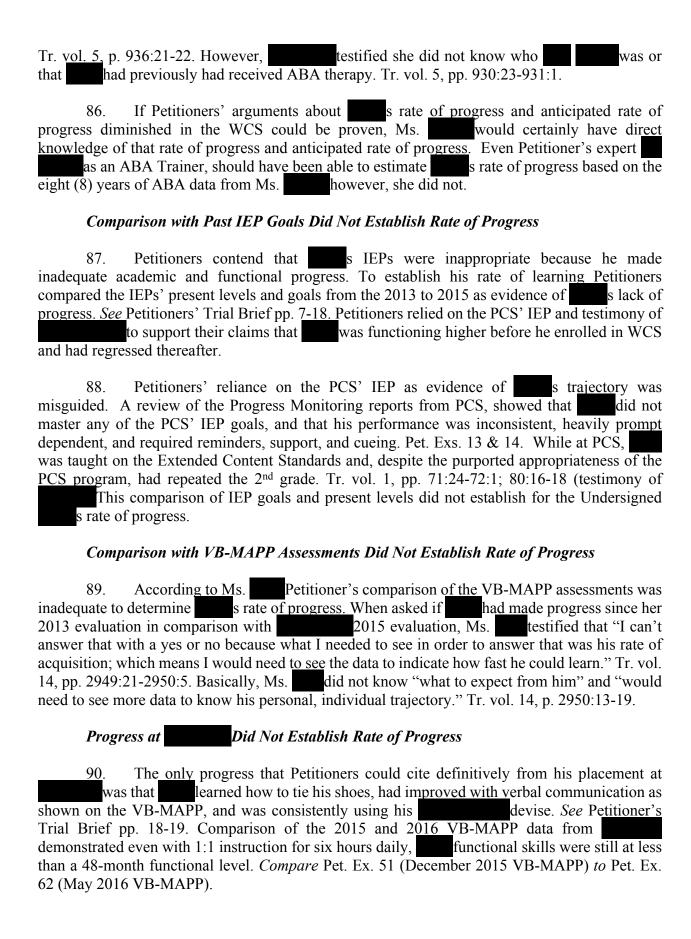


# s Self-Stimulatory Behaviors



IEP development for autistic students, and ABA therapy.

In addition, no data collection, progress monitoring, therapy notes, or the like, taken by Ms. this time period were ever produced by Petitioners during the development of the relevant IEPs or as part of the Contested Case Hearing (during discovery, or offered as evidence during the Petitioners case-in-chief).



- performed at a Level 1 (0-18 months) or Level 2 (18-30 91. In most areas, months). The only Level 3's (30-48 months) were math, classroom routines and group skills. After four months of intensive services, had made minimal progress in 5 of the 15 areas and remained at less than 30 months functionally for most skills. Pet. Ex. 62. 92. There was insufficient evidence offered by the Petitioners to establish expected rate of progress despite the extensive ABA data available from the eight years of Petitioner's home-based ABA program and the 4 months of the intensive (6 hours daily, one-onone instruction) ABA program at Petitioners did not introduce any evidence that the progress contemplated by 93. IEPs, as developed, was inappropriate in light of scircumstances existing at the time of the development of the IEPs. 94. did not give an opinion about s expected rate of Petitioners' expert Moreover, did not testify that the relevant IEP goals progress in WCS or at failed to contemplate sufficient progress considering the circumstances unique to The evidence introduced at hearing by Petitioners did indicate that Ms. and who actively participated in the development of both the January 2014 and January 2015 IEPs, did not raise any objections to the Present Levels or goals as not evidencing or anticipating appropriate progress for Stip. Ex. 10; Stip. Ex. 11, p. 186; Stip. Ex. 12, p. 224; Stip. Ex. 13, pp. 262-263; Tr. vol. 4, p. 838: 24-25; Tr. vol. 11, p. 2442. Respondent's Experts Testified as to the Appropriate Anticipated Rate of Progress for Respondent's expert Dr. testified that a student with a nonverbal IQ of 49 96 could be expected to have incremental and inconsistent progress and, although he could make progress, his progress would be "up and down." Tr. vol. 17, pp. 3679:9-3680:24; Tr. vol. 21, pp. 4307, 4322:13-17. This is consistent with the testimony of Respondent's other expert who had the most relevant and comprehensive experience working with of any witness at the hearing. Tr. vol. 25, pp. 5295:24-5296:1, 5321:20-5322:1. 97. and Dr. testimonies regarding an expectation of incremental and inconsistent progress, given s level of cognitive functioning, was collaborated by other members of the IEP team who had worked with directly. See Tr. vol. 9, pp. 1995:10-18, Tr. vol. 13, pp.  $2\overline{686:15-17}$ , 2687:1-5, 2699:10-13 (testimony of 2003:8-9 (testimony of
- 98. Based on the probative and credible evidence, the Undersigned finds that rate of progress was, at best, inconsistent, incremental, highly situationally dependent, and heavily prompt dependent.

Tr. vol. 20, p. 4245:14-16; (testimony of

pp. 4755:24-4756:3; Tr. vol. 25, 5245:5-10, 5295:24-5296:1 (testimony of

(testimonies of

Tr<u>. vol. 18, pp. 3905</u>:11-12, 3793:16-18, 3794:13-17, 3818:25-<u>3819:2-6</u>, 3847:7-12

Tr. vol. 23.

### APPROPRIATENESS OF JANUARY 2014 AND JANUARY 2015 IEPS.

	99.	Drs.	and	held divergent view	s o <u>n the</u>	appropriaten	ess of the IEPs	. Both
parties	out-of	-state	expert witnesse	es, had never evaluate	ed	or worked di	rectly with him	. They
both re	lied on	a revi	ew of	educational records,	deposition	ons of teaching	ng staff and rev	viewed
videos	of vario	ous da	tes (not receive	ed in evidence).				

- Despite their impressive curricula vitae, *see* Pet. Ex. 106 and Res. Ex. 98, the most credible witness in Petitioner's case-in-chief was who was subpoenaed to testify by both parties and not offered as an expert by either. Ms. has been admitted numerous times in this Tribunal as an expert on VBA, education of autistic students, and as a speech pathologist.
- at some level, in second second planning at WCS through, at least, the June 2015 IEP meeting, testified that some level, in the second planning at WCS through, at least, the June 2015 IEP meeting, testified that second second planning at WCS through, at least, the June 2015 IEP meeting, testified that second second
- 102. Respondent then proffered, for days, an exorbitant amount of data supporting each Present Level, goal, and objective for both the January 2014 and January 2015 IEPs.

#### **JANUARY 2014 IEP**

- 103. The January 2014 IEP would have expired on December 16, 2014 but for the Petitioners' requests beginning November 21, 2014 (Pet. Ex. 36, p. 980) to reschedule the dates for annual review IEP meetings which were proposed by the Respondent prior to the IEP expiration date. Pet. Ex. 36, pp. 972-975 (preferred to wait until next year [2015]); see also, Pet. Ex. 36, pp. 967-996 (attempts to schedule IEP meeting). If the January 2014 IEP had been of one-year duration, it would have expired on January 15, 2015. During the relevant time period, the January 2014 IEP was implemented for sixteen (16) school days. Stip. 50.
- 104. Petitioners did not allege any procedural violations regarding the extension of the January 2014 IEP. Even assuming *arguendo* that the January 2014 IEP's Present Levels and goals were inappropriate, the Petitioners failed to produce any specific evidence of educational harm during the 16-day implementation period.

# Present Level of Academic Achievement and Functional Performance (hereinafter "Present Levels")

105.

14, 2014 is outside the limitations period in this matter. To the extent that factual findings are necessary for judicial review, the Undersigned makes the following factual findings with respect to the January 2014 IEP.
106. The January 14, 2014 IEP meeting was a facilitated IEP meeting. Stip. Ex. 10, p 136; Tr. vol. 23, p. 4890:3-4. In attendance were parent advocate and autism specialist and speech pathologist. Stip. Ex. 10, p. 136; Tr. vol. 7, p. 85:7-11 (testimony of
107. The Present Levels of performance were drafted by his 4 <sup>th</sup> grade teacher and WCS Program Specialist, prior to the January 14, 2014 IEP meeting. Tr. vol. 23, p. 4899:24-2 (testimony of
108. No portion of the January 14, 2014 IEP was finalized until everyone on the IEI team agreed to what was developed on that portion. Tr. vol. 14, p. 3156:12-16 (testimony of Tr. vol. 23, p. 4794:4-6 (testimony of
109. Data that had been used to develop the draft present levels on the January 14, 2014 IEP was available for anyone's review. Some sample of the Present Levels were discussed and explained at the January 2014 IEP meeting. Petitioner sparticipated in and was provided an opportunity to give input as to spresent Levels at the January 2014 IEP meeting and she never indicated that the Present Levels were inaccurate. Tr. vol. 23, p. 4900:6-7.
110. All persons at the January 2014 IEP meeting, including Petitioner and he consultant, agreed to the Present Levels of performance included in the January 2014 IEP.

The appropriateness of the Present Levels included in the IEP developed on January

112. The Undersigned also finds that the Present Levels in the January 2014 IEP were procedurally and substantially appropriate under the IDEA.

the IEP meeting, the expertise of their private autism specialist and ABA provider who both had extensive personal knowledge about s academic and communication levels. The Undersigned finds that the Petitioners were afforded meaningful participation in all aspects of the

Even though Petitioners were "lay persons," they had available, prior to and during,

## Goals of January 2014 IEP

IEP development during the January 14, 2014 IEP meeting.

113. The January 2014 IEP incorporated the recommendations of speech pathologist Ms. conducted a Verbal Behavior Milestones Assessment and Placement Program ("VB-MAPP") of on December 10, 2013. Stip. Ex. 3. The VB-MAPP "contains 170"

measurable learning and language milestones that are sequenced and balanced across 3 development levels, 0-18 months, 18-30 months, and 30-48 months." Stip. Ex. 3, p. 4. "Information for the assessment was gathered through *direct probing of skills as well as interviews with [ stip current and previous teachers.*" Stip. Ex. 3, p. 4 (emphasis added).

- took over so 5th grade classroom in January 2015, shortly before so IEP underwent an annual review. Tr. vol. 23, p. 4901:2-9. According to Ms. the IEP goals on the January 2014 IEP were appropriate (Tr. vol. 23, p. 4900:9-10), the goals were measurable (Tr. vol. 23, p. 4900:12-13), and addressed weaknesses identified as part of so Present Levels (Tr. vol. 23, p. 4900:14-15). Moreover, the goals were developed with the input of Petitioners and their advocates (Tr. vol. 23, p. 4900:17-20), they were agreed upon by everyone at the January 2014 IEP meeting (Tr. vol. 23, p. 4900:21-23), and everyone agreed that made progress on the goals in his previous IEP (Tr. vol. 23, pp. 4900:24-4901:1).
- 116. The Undersigned finds that the goals in the January 2014 IEP were procedurally and substantively appropriate under the IDEA. The Undersigned also finds that the Petitioners failed to prove by a preponderance of the evidence that the January 2014 IEP was not reasonably calculated to enable to make progress appropriate in light of his circumstances.

# Implementation of Special Education Services and Related Services of the January 2014 IEP.

- 117. The IEP developed on January 14, 2014, was implemented for approximately sixteen (16) school days within the relevant limitations time in this matter. Stip. 50.
- With exception of four (4) sessions of speech language services during the relevant period, and s January 2014 IEP was fully implemented for

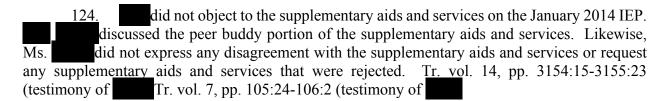
Related Services Implementation from December 16, 2014 to January 19, 2015

- 119. During the period between December 16, 2014 to January 19, 2015, four speech sessions were omitted. *See* Pet. Ex. 112. All OT services were implemented.
- At the June 9, 2015 IEP meeting, the speech therapist advised the team members that was owed 6 hours and 25 minutes of compensatory speech services for missed sessions during the entire 2014-2015 school year. Stip. Ex. 13, p. 264. This compensatory speech service was provided during the summer of 2015 and included the four sessions missed during the relevant implementation period of the January 2014 IEP.

- 121. Except for speech services, Petitioners offered no evidence that the January 2014 IEP was not fully implemented. Petitioners offered no evidence that, if the January 2014 IEP was not implemented, any failure to implement the January 2014 IEP caused a deprivation of FAPE.
- 122. The Undersigned finds that, except for 4 speech sessions during the 16-day period,, the January 2014 IEP was implemented appropriately. Because had already been provided compensatory speech prior to the initiation of this contested case that issue was moot and not a denial of FAPE.

## Supplemental Aids and Services in January 2014 IEP

123. The IEP team discussed supplemental aids and services at the January 2014 IEI
meeting and made amendments to that portion of s IEP. The IEP team did not move on from
the supplementary aids and services until all members of the IEP team agreed upon them on the
IEP.



- 125. On cross examination, Petitioner was asked repeatedly whether there were any supplementary aids and services she requested that the IEP team rejected in developing the January 2014 IEP. The only supplemental aid identified was that the token board was being used inconsistently. Tr. vol. 7, pp. 103:23-105:23 (testimony of
- 126. The IEP team also discussed splacement in the regular education room and determined that s IEP could not appropriately be implemented there even with supplementary aids and supports. Tr. vol. 14, pp. 3157:15-3158:11 (testimony of
- 127. The IEP team discussed amendments to the supplemental aids and services and unanimously agreed to the supplementary aids and services included in the IEP. Tr. vol. 13, p. 2778 (testimony of

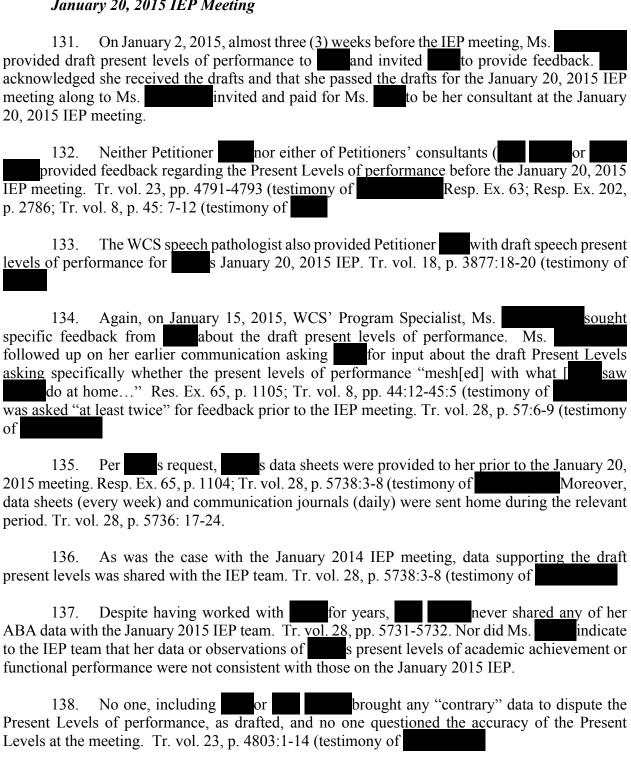
#### **JANUARY 2015 IEP**

- 128. The IEP developed at the January 20, 2015 (as amended in June 2015) is the IEP that governed the majority of the time at issue in the present case. Stip. Ex. 12, p. 193.
- 129. Again, at the January 2015 IEP meeting, so focus was verbal speech, that "will be a speaker sometime in the future." Stip. Ex. 12, p. 225. The Parents' Vision for the Future was that "communicate his needs." Stip. Ex. 12, p. 225.
- 130. Ms. also emphasized that the team "should increase home-school communication regarding the communication and targets ... it would work well both ways so that

the school could know what was being worked on at home." Stip. Ex. 12, p. 224. Again, no information was provided about shome ABA program.

## **Procedural Appropriateness of January 2015 IEP**

## January 20, 2015 IEP Meeting



- 139. Also, as had been the case at the January 2014 IEP meeting, at the January 2015 IEP meeting, the IEP was developed by projecting the IEP document onto a screen and working on it from beginning to end. Tr. vol. 23, p. 4793:18-20 (testimony of the IEP was projected for the IEP team to work through at both the January 2014 and January 2015 IEP meetings. Tr. vol. 15, p. 3213:10-14; vol. 14, p. 3112:10-14 (testimony of
- 140. For each portion of the IEP, the IEP team did not move on until and unless "there was consensus." Tr. vol. 23, pp. 4793:24-4795:5.
- had previously communicated to WCS when she wanted goals rewritten for (Res. Ex. 141), and acknowledged that she could make suggestions and contribute in drafting the IEP goals as a member of the IEP team. Tr. vol. 8, pp. 82:19-25, 83:4-6, 10-14 (testimony of
- WCS needed to work on as part of states s IEP goals. IEP made no suggestions that were rejected by the IEP team about what see needed to work on in the goals in the January 2015 IEP. Tr. vol. 8, p. 83:10-18 (testimony of
- 143. No one disagreed with the Present Levels of performance as not being reflective of that person's opinion or observation as to scurrent skill levels. "If there were questions we addressed them, clarified, gave examples and if it needed to be reworded, we reworded it. But the present level was accepted upon consensus agreement by the team." Tr. vol. 23, p. 4802:18-24 (testimony of
- did not raise any objections to the Present Levels of performance at the January 2015 IEP meeting. Tr. vol. 15, p. 3201:21-24 (testimony of
- 145. In addition, admitted that as of October 23, 2015, neither she nor her consultant had ever disputed any Present Level at any of the IEP meetings she had attended. Tr. vol. 7, p. 176:4-10 (testimony of
- 146. The meeting minutes from the January 20, 2015 IEP evidenced that each Present Level in every area of need for was presented for discussion with the IEP team, and that as well as a participated in the discussion with changes being made based on their input. Stip. Ex. 12, pp. 225-227.
- 147. Petitioner was provided an opportunity to meaningfully participate in the development of the January 2015 IEP and the IEP minutes documented extensive parent involvement. Stip. Ex. 12, pp. 225-227; Tr. vol. 8, pp. 148:20-25, 149:1-8.
- 148. Other than the Prior Written Notice from the June 9, 2015 IEP meeting discussed *infra* with respect to the access to nondisabled peers issue, the Undersigned finds that the January 2015 IEP was procedurally appropriate and that the Petitioners and their consultants were afforded meaningful participation in the development of the IEP at the January 20, 2015 IEP meeting.

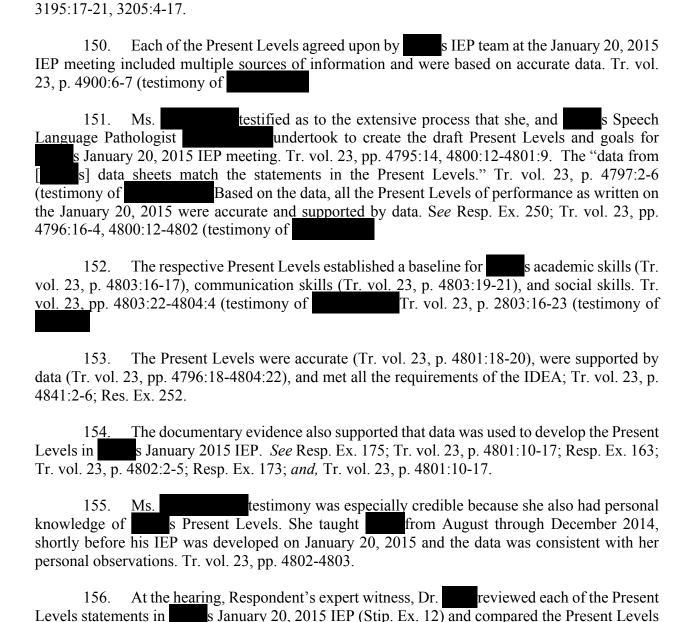
## **Substantive Appropriateness of January 2015 IEP**

would be appropriate, in her opinion, to the extent they were based upon the data. Tr. vol. 15, pp.

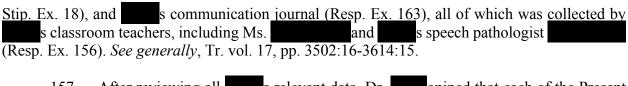
As previously stated, Ms. testified that spresent levels of performance

## Appropriateness Academic and Functional Present Levels

Data Supported Academic and Functional Present Levels



statements to the corresponding academic quantitative and qualitative data, including teacher data sheets (Resp. Exs. 173, 175, 156), the December 3, 2014 Brigance Assessment (Resp. Ex. 170,



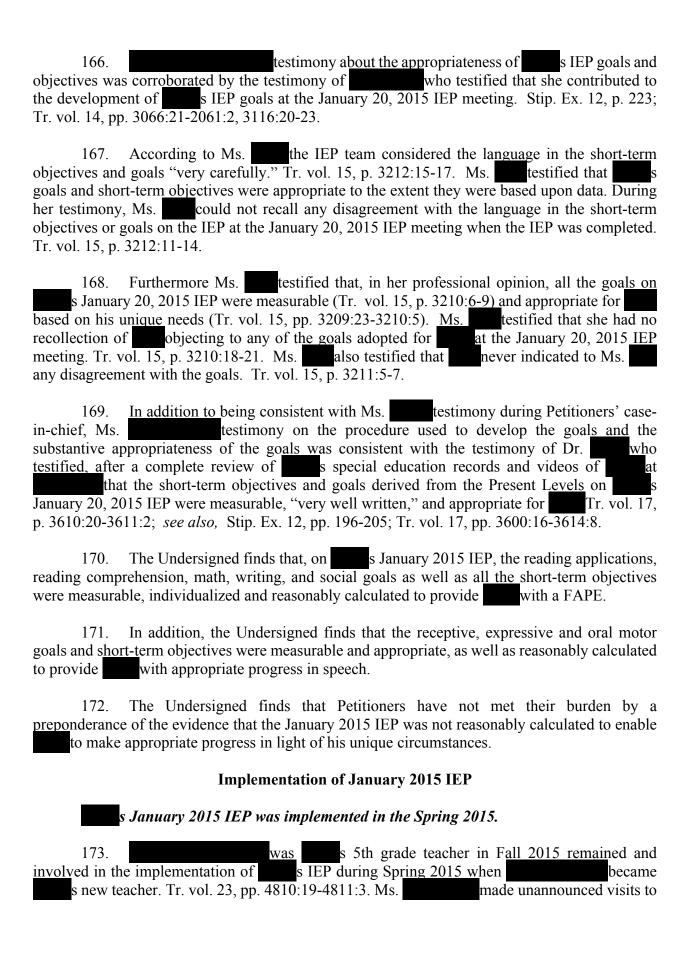
- 157. After reviewing all series is relevant data, Dr. popined that each of the Present Levels statements in series January 20, 2015 IEP were appropriate, were based on data, and that the Present Levels "greatly exceed" the norm for IEPs and the requirements of the IDEA. Tr. vol. 17, pp. 3610:15-18, 3611:3-8.
  - 158. The probative evidence in Dr. testimony was overwhelming as shown:
    - <u>reading applications</u>: Res. Ex. 170, pp. 2425-2429; Stip. Ex. 18;
    - reading comprehension: Tr. vol. 17, pp. 3567-3568, 3576:4-3582:10;
    - math: Tr. vol. 17, pp. 3568:22-3574:23; 3593:25-3600:12-15 (compared Res. Ex. 170, p. 2432 to Res. Ex. 173 & 175); single digit addition and subtraction (Res. Ex. 170, p. 2433); multiplication and division (Res. Ex. 170, p. 2434); still working on orally counting backwards identifying written times on an analog clock (Res. Ex. 175); and identifying coins by value (Res. Ex. 175);
    - <u>writing</u>: Tr. vol. 17, pp. 3583:11-3590:5 (compared the data in Res. Exs. 173 and 175; (inconsistent with writing a noun-verb combination to describe a picture); (compared Res. Ex. 175, p. 2492 "unable to sequence a given set of words"); (compared Rep. Ex. 175, p. 2487 at certain dates and Res. Ex. 163, pp. 2221-2222); and,
    - <u>social skills</u>: Tr. vol. 17, pp. 3601:13-3611:2 (compared Res. Ex. 173 and Resp. Ex. 156); (Res. Ex. 173, p. 2481); (Res. Ex. 175, p. 2496).

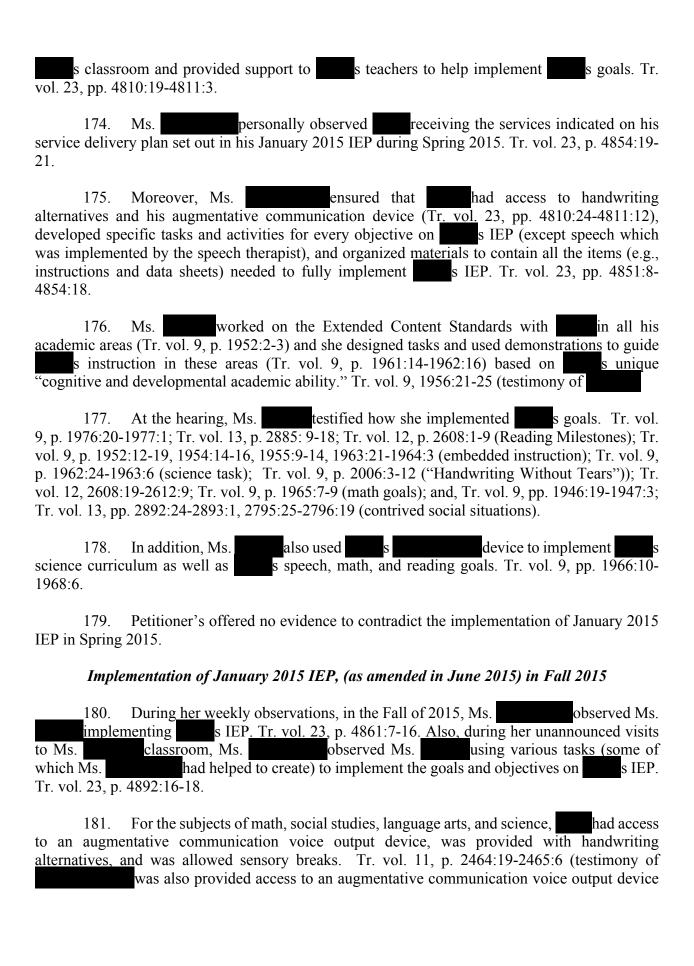
Data Supported Speech Present Levels

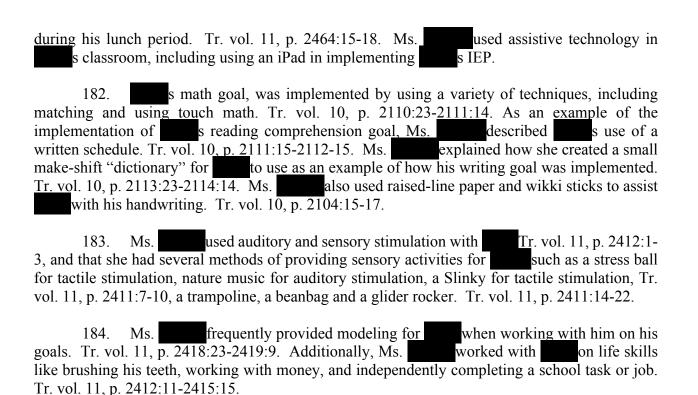
159. Some series Present Levels for speech were based on the speech therapist's data from the Fall 2014 (the semester leading up to the development of the January 20, 2015 IEP). Tr. vol. 18, p. 3877:21-24 (testimony of Tr. vol. 23, p. 4798:8-16 (testimony of See also, Tr. vol. 17, p. 3543:12-16 (testimony of Dr.

Petitioners contended that the Brigance should not have been used to develop the Present Levels because its administration was modified. Dr. testified that there was nothing improper about using a "non-standard" administration of the Brigance, since the modifications (i.e., "the questions and choices were read aloud," "was given the receptive assessment since he had difficulty orally pronouncing multi-syllable words with sufficient clarity to make it correct") were noted in the Present Levels, and anyone else reviewing as IEP would be able to read and understand the modifications that had been made in the Brigance administration. Tr. vol. 17, pp. 3563:10-3564:14, 3564:15-24, 3564:2-7; Stip. Ex. 12, p. 200. Ms. modifications, as testified to by Dr. were "clear" and "quantifiable" in the Present Levels. Tr. vol. 17, p. 3655:2-4.

160. Although this data was available at the January 20, 2015 IEP meeting, no one asked to review the data or questioned the accuracy of the data. Tr. vol. 18, p. 3878:3-5. No one disagreed with the speech Present Levels that were drafted. Tr. vol. 18, p. 3878:3-22 (testimony of s receptive speech Present Levels on the January 20, 2015 IEP was an accurate representation of services receptive speech abilities at that time. Tr. vol. 18, pp. 3880:23-Tr. vol. 17, p. 3543:12-16 (*comparing* Resp. Ex. 156 with receptive 3888:12 (testimony of speech Present Levels) (testimony of Dr. Likewise, the expressive speech Present Levels s January 20, 2015 IEP, was based on data and the speech therapist's observations T<u>r. vol.</u> 18, pp. 3887:16-3892:21 (testimony of working with oral-motor skills on s January 20, 2015 IEP were based on data, the speech therapist's observations working with and were accurate representations of s oral motor abilities at that time. Tr. vol. 18, pp. 3892:22-3897:2; see, Resp. Ex. 156, Resp. Ex. 157, and Pet. Ex. 20. s oral-motor skills were derived directly from The Present Levels for administration of the VB-MAPP (Stip. Ex. 3, p. 9, Tr. vol. 17, pp. 3534:4-3535:12), and supported by data. Tr. vol. 17, pp. 3543:12-16, 3547:21-3548:1. The Undersigned finds that see Present Levels in the January 2015 IEP met the substantive requirements of the IDEA. s January 2015 IEP included a description of what could and could not do in each of the areas addressed by the IEP, s current academic and functional performance, information about behavior and social emotional development, and s disability affected his involvement and progress in the general curriculum. how Appropriateness of Goals in January 2015 IEP All of the goals and short-term objectives in s January 20, 2015 IEP were related to his Present Levels of performance (Tr. vol. 23, pp. 4823:12-15) and supported by the evidence. See receptive speech Present Levels and goals (Tr. vol. 23, pp. 4812:18-4814:14); the reading applications Present Levels and goals (Tr. vol. 23, pp. 4814:15-4815:13); the expressive speech Present Levels and goals (Tr. vol. 23, pp. 4815:15-4816:9); the reading comprehension Present Levels and goals (Tr. vol. 23, pp. 4816:19-4817:11); the writing Present Levels and goals (Tr. vol. 23, pp. 4817:12-4819:8); the math Present Levels and goals (Tr. vol. 23, pp. 4819:12-4821:23); and, the social skills Present Levels and goals (Tr. vol. 23, pp. 4821:24-4823:8). All the goals and objectives on s January 20, 2015 IEP addressed weaknesses that were identified in his Present Levels of performance. Tr. vol. 23, p. 4823:16-18 (testimony of The Undersigned gave great weight to the testimony of Ms. the WCS Program Specialist, an expert in IEP development for students with autism and a teacher who had during two of the three full school years he was in WCS, that objectives on his January 20, 2015 IEP were appropriate at that time the IEP was developed (Tr. vol. 23, p. 4841:7-11; Tr. vol. 23, p. 4841:12-16) and were "reasonably calculated for receive appropriate education benefit." Tr. vol. 23, p. 4841:18-24.







- 185. Ms. gave specific example of methods she used in implementing states and specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods she used in implementing states are specific example of methods are specific example.
- 186. Petitioner offered no probative evidence to contradict that the January 2015 IEP was implemented in the Fall 2015.

## Supplemental Aids and Services January 2015 IEP

- 187. The operative IEPs during the 2014-2015 school year reflect, on their face, that the IEP team considered supplementary aids and services necessary to educate in the least restrictive environment and still allow him daily access to his non-disabled peers. No one at the IEP meeting suggested that could be educated in the regular setting with supplementary aids or services. Tr. vol. 23, p. 4845:6-13.
- 188. The Undersigned having already determined that the separate setting was an appropriate placement for any failure to consider placement of in the regular education setting with supplementary aids and services is at most a technical procedural violation that did not impact as receipt of FAPE. Nonetheless, there was ample evidence that the IEP teams developing the operative IEPs considered supplementary aids and services for at the January 20, 2015 IEP meeting. Tr. vol. 23, pp. 4824:24-4825:3, 4847:15-21.

# Implementation of Speech Services

January 20, 2015 to June 9, 2015

- 189. During the period from January 20, 2015 to June 9, 2015, the WCS speech therapist failed to provide with twelve (12) sessions of speech services. *See* Pet. Ex. 116, pp. 2147-2151.
- 190. In Respondent's January 23, 2017 Memorandum, WCS contended that no speech language services are owed because the speech therapist Stacy Gay inadvertently provided 240 minutes more of speech services during the summer of 2015. See Res. Memorandum, p. 3 citing Pet. Ex. 27 and Res. Ex. 154. According to the Respondent, there can be no educational harm since received speech/language services in excess of those required in his IEP. Res. Pro. Dec. p. 44.
- 191. WCS does not deny that compensatory speech therapy was owed for the 2014-2015 school year period, but contends that it should be credited from the excess speech hours provided during the summer of 2015.
- 192. The Undersigned agrees that no additional compensatory speech is owed for the sessions omitted from January 20, 2015 to June 9, 2015 because received compensatory speech services during the summer of 2015 for these 12 sessions.

August 24, 2015 to October 23, 2015

- 193. From August 24, 2015 to October 23, 2015, the remainder of the relevant implementation period for the January 2015 IEP, WCS speech therapist failed to provide seven (7) sessions or 175 minutes of speech therapy. Pet. Ex. 116. This amount represented 21% of speech services during the fall of his 2015-2016 school year. *See* Pet. Proposed Dec. p. 52.
- 194. Petitioners asserted that the overall omission of speech services caused regress in his expressive and receptive skills as evidenced by the speech therapists' data sheets. *See* Pet. Proposed Dec. pp. 53-55. A review of the speech data showed that was inconsistent with his mastery of the expressive and receptive skills. All parties concede that speech therapy was an important part of his educational program.
- 195. Respondent requests a retroactive award of compensatory speech services for the missed sessions in Fall 2015 because of its provision of excess speech services during the summer 2015.
- 196. Petitioners, on the other hand, argue that any excess compensatory services from the summer of 2015 should be applied to the amount owed in the Compensatory Services Agreement, *see supra*, and that these are separate unanticipated speech services which are still owed. The Undersigned agrees with Petitioner's that WCS cannot "bank" ahead for a future denial of FAPE.

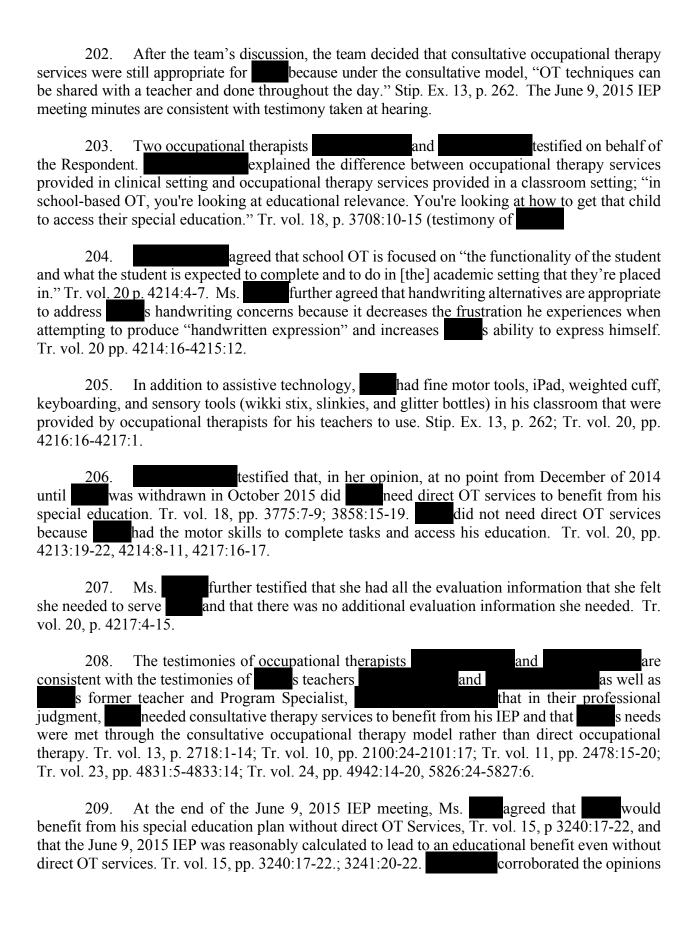
197. The Undersigned finds that this intermittent omission of speech services represented a material portion (21%) of speech therapy during the Fall of 2015; therefore, is entitled to 7 sessions of 25 minutes duration (175 minutes) of compensatory speech therapy.

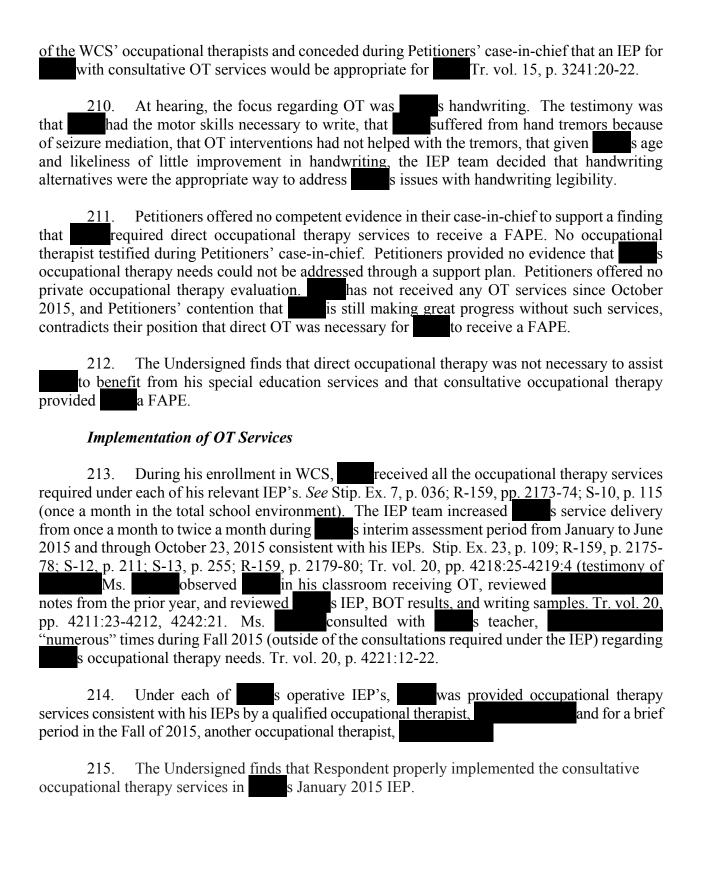
# **Appropriateness and Implementation of Occupational Therapy**

# Direct or Consultative Occupational Therapy

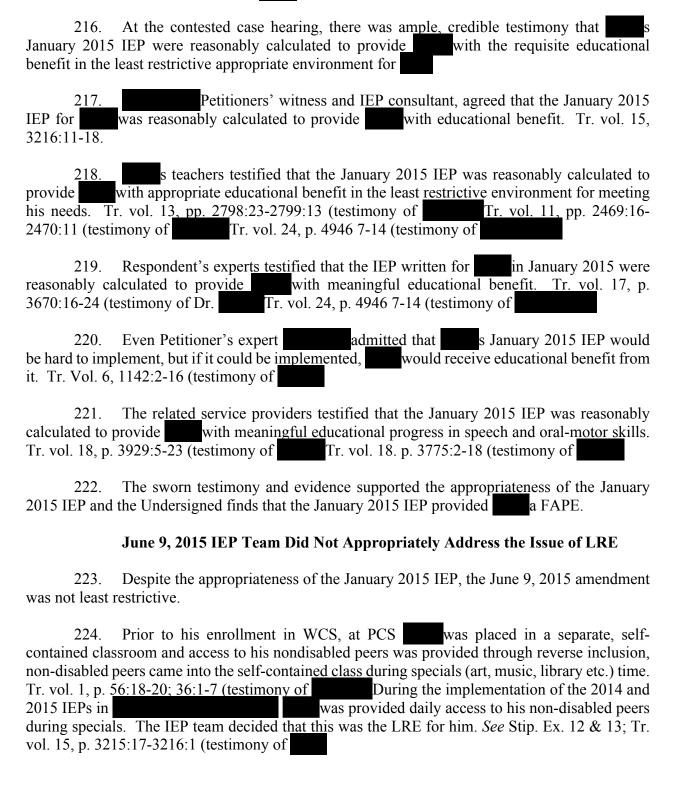
- 198. Petitioner claims that Respondent failed to provide related services that would "enable [t]o advance appropriately toward attaining [his] annual goals . . . [and] make progress" in violation of 34 C.F.R. 300.320(a)(4), and that therapy services. See Pet. Ex. 28, pp. 777-78 (demonstrating the sillegible handwriting); Pet. Ex. 21, pp. 459-67 (demonstrating that the required direct occupational therapy services); Tr. vol. 3, p. 563:14-18 (testimony of that the required direct occupational therapy services); Tr. vol. 3, p. 661:2-15 (testimony of Petitioner tregarding the services motor planning difficulties); and Tr. vol. 14, p. 3079:3-5 (testimony of
- 199. Occupational therapy services qualify as a "related service" under the IDEA and its implementing regulations. "Related services" means "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes…physical and occupational therapy…." 34 C.F.R. § 300.34(a).
- a reevaluation in occupational therapy in the areas of "visual motor integration, eye/hand coordination, fine and gross motor." Stip. Ex. 12, pp. 191-192, 227. During the assessment period, the IEP team agreed to increase occupational therapy services to 2 times per month. Stip. Ex. 12, pp. 211; Resp. Ex. 23, p. 109. So occupational therapist, period of the Bruininks-Osertsky Test of Motor Proficiency ("BOTS"). Stip. Ex. 6. The occupational therapy evaluation confirmed that so motor skills were "well below average to below average." Stip. Ex. 6, p. 16.
- 201. At the June 9, 2015 IEP meeting, the IEP Team convened to discuss the results of the BOT Assessment and discuss transition planning for supposition upon transition to middle school. The results of the occupational therapy reevaluation were shared with the IEP Team. Stip. Ex. 13, p. 262. After discussing the results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9, 2015 IEP meeting minutes evidenced that the "[t]he team discussed whether results of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is a supplication of the BOT, the June 9 is

Interestingly, Ms. Lestified that if a child with average cognitive abilities demonstrated of fine motor deficits, she would recommend direct occupational therapy services. Tr. vol. 18, p. 3850:3-14. However, Ms. Lestified to show any justification for this position. The IDEA, its implementing regulations, and the *North Carolina Policies Governing Services for Children with Disabilities* do not support Ms. Lestified that if a child with average cognitive abilities demonstrated services services. Tr. vol. 18, p. 3850:3-14. However, Ms. Lestified that if a child with average cognitive abilities demonstrated services. Tr. vol. 18, p. 3850:3-14. However, Ms. Lestified that if a child with average cognitive abilities demonstrated services. Tr. vol. 18, p. 3850:3-14. However, Ms. Lestified that if a child with average cognitive abilities demonstrated services. Tr. vol. 18, p. 3850:3-14. However, Ms. Lestified to show any justification for this position. The IDEA, its implementing regulations, and the *North Carolina Policies Governing Services for Children with Disabilities* do not support Ms. Lestified that if a child with average cognitive abilities demonstrated services.

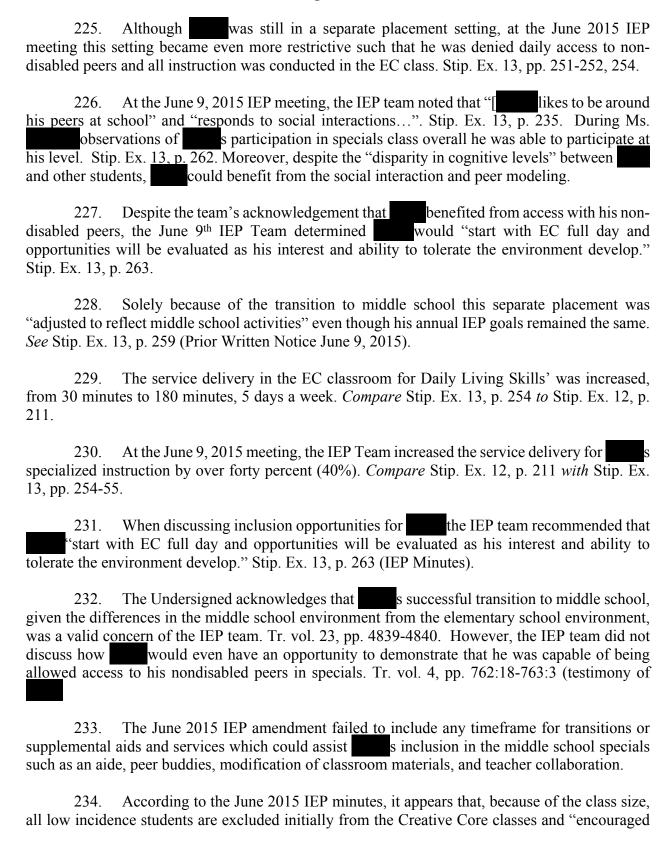




# January 2015 IEP Was Reasonably Calculated to Provide Appropriate Educational Benefit

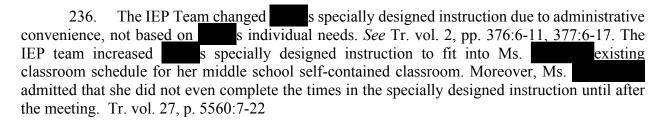


# Access to Non-Disabled Peers During Middle School Transition Fall 2015



to participate in regular electives as they can tolerate the activity (classes are huge)." Stip. Ex. 13, p. 262. This general policy violated the LRE mandate of the IDEA.

235. In Fall 2015, was provided limited, but not daily, opportunities to interact with his non-disabled peers for the short period he was at 2062, 2118 (on the playground), 2162 (field trips), 2162-2163 (Club Unify); 2163 (charity auction); 2387 (arrangements in process for to attend a math class with non-disabled peers)



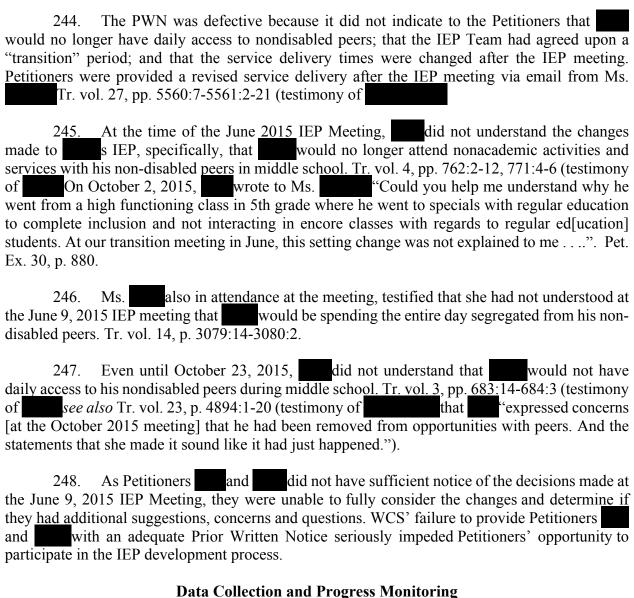
(testimony of

- 237. The WCS' witnesses claimed that had stayed enrolled in the WCS, he would have been allowed additional access to nondisabled peers. *See* e.g., Tr. vol. 11, pp. 2447:22-2448:3. The documentary evidence undermined these assertions.
- 238. For example, upon learning of secret secretarial secretarial
- 239. Evidence admitted at the hearing established that WCS attendees believed the meeting on October 23, 2014 was not an IEP meeting, just a parent-teacher meeting for the purpose of compensatory planning. Res. Ex. 77; Tr. vol. 23, pp. 4893:4894; vol. 20, p. 4152.
- 240. Furthermore, Ms. description of her class and the inherent, predetermined lack of access to nondisabled peers for all her students, revealed there were no actual efforts or intent to allow increased access to nondisabled peers until complained. Pet. Ex. 30, pp. 877-78.
- 241. The testimony that splacement might have become less restrictive had his parents allowed him to remain enrolled in the WCS beyond the first grading period, is speculative when even an IEP meeting had not been planned during that period.
- 242. The Undersigned finds that the June 9, 2015 IEP Team did not appropriately address the issue of LRE in the amended IEP.

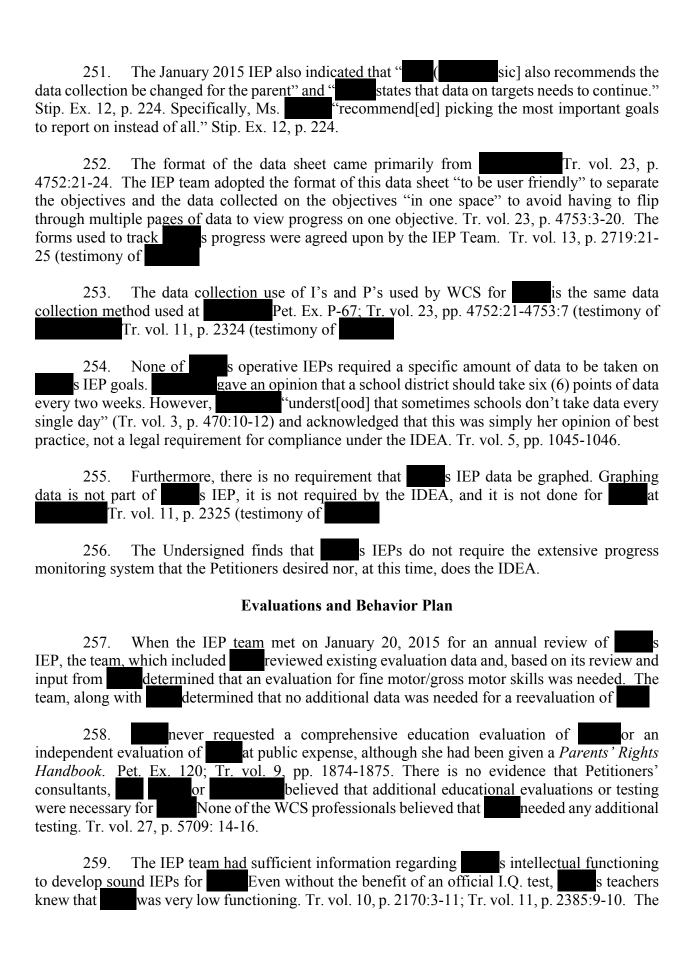
# Prior Written Notice of Restriction of Secretary Secretary Access to Non-Disabled Peers

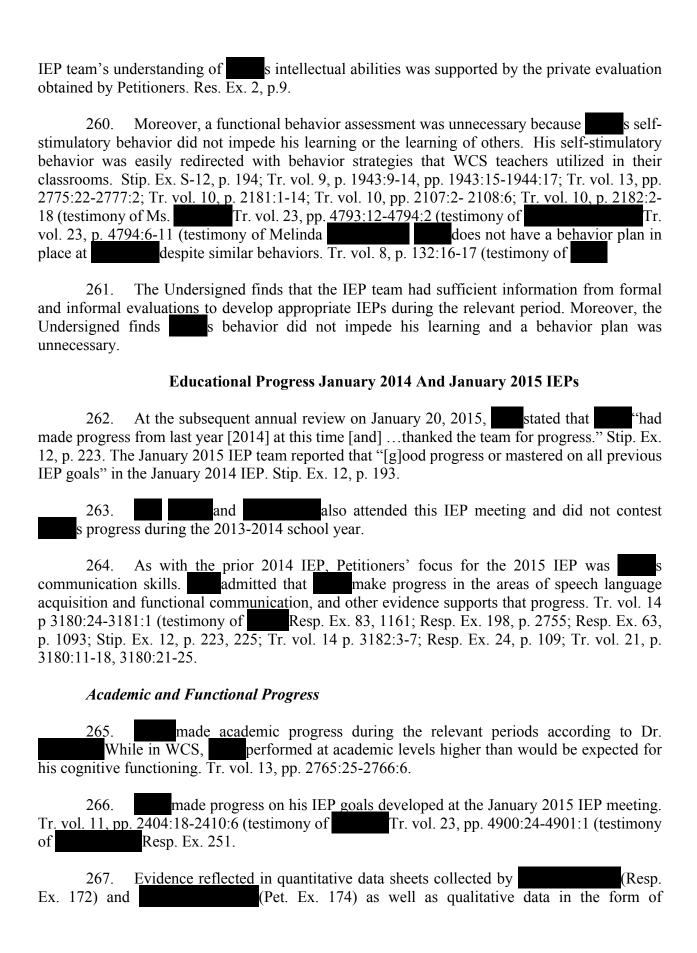
243. According to the June 9, 2015 Prior Written Notice ("PWN"), "IEP service time [was] changed to reflect middle school needs." and "[s]ervice time needed to be adjusted to reflect middle school activities." Stip. Ex. 13, p. 259. "Not adjusting services was rejected because the

classes and activities available in middle school differ from elementary school." Stip. Ex. 13, p. 259.



- Petitioners offered no authority to support their contentions that the progress monitoring was inappropriate. The format of the data sheets used to collect data for developed and agreed upon by the IEP teams.
- During the 2013-14 school years and the Fall of 2014, recorded daily using an "Independent" and "Prompt" response method ("I" and "P"). Meeting minutes from the January 20, 2015 IEP meeting indicated that the IEP team discussed changing the format of the data collection because had "gotten the data sheets but feels that is not wholly communicating the information." Stip. Ex. 12, p. 224.





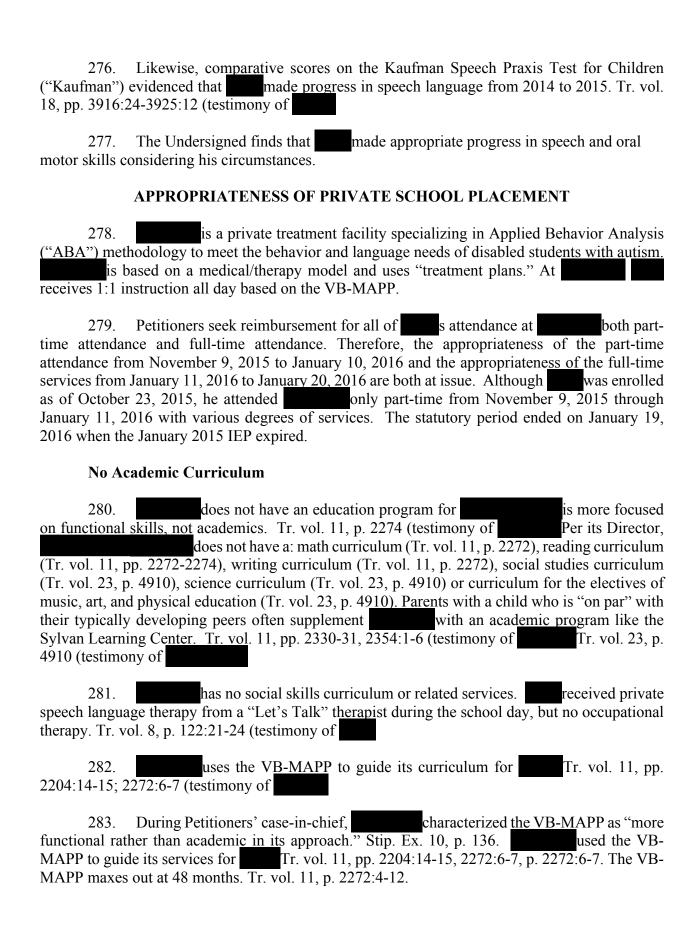
communication journals (Resp. Ex. 162; Resp. Ex. 163) from steachers to S.B corroborated this progress.

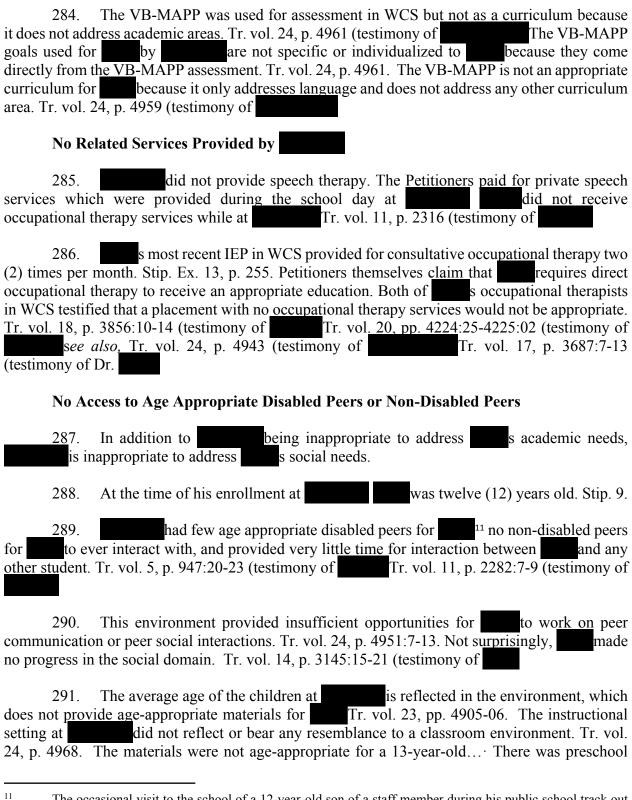
- pp. 196-197) was supported by data (Resp. Ex. 251, pp. 11-12); reading comprehension goal from the 2015 IEP (Stip. Ex. 12, pp. 2015 IEP (Stip. Ex. 12, pp. 200-201) was supported by data (Resp. Ex. 251, pp. 13-16); his writing goal progress from the 2015 IEP (Stip. Ex. 12, pp. 202-203) was supported by data (Resp. Ex. 251, pp. 17-18, 21); his math goal from the 2015 IEP (Stip. Ex. 12, pp. 204-205) was supported by data (Resp. Ex. 251, pp. 19); and, his social goal from the 2015 IEP (Stip. Ex. 12, pp. 206-207) was supported by data (Resp. Ex. 251, pp. 20; Resp. Ex. 154).
- s progress was also reflected on the NCExtend 1 assessments which increased in reading and math from scores of 1 to scores of 3.10 Stip. Ex. 36; Stip. Ex. 12, p. 193; Tr. vol. 23, p. 4780:14-21; Stip. Ex. 11.
- 270. Petitioners provided no probative evidence to refute that sprogress was inconsistent and incremental. The Undersigned finds that, during the relevant time periods, made academic, functional, and social skills progress appropriate in light of his circumstances.

# Speech Progress

- 271. Testimony about s progress in speech was given by In addition, the summary of Ms. analysis of s speech data was also admitted as evidence. Resp. Ex. 251.
- 272. Data supported the testimony at hearing that goals. Quantitative data collected by Resp. Ex. 156; Resp. Ex. 157; Pet. Ex. 20), Stacey Gay (Pet. Ex. 114; Resp. Ex. 154), and Resp. Ex. 158) during 2014-15 and 2015-15 school years, along with qualitative data in communication journals facilitated by steachers, evidenced his progress. Resp. Ex. 162; Resp. Ex. 163; and Pet. Ex. 29.
- s progress on his speech goals was evident by this data: expressive speech goal (Stip. Ex. 12, p. 195) (Resp. Ex. 251, pp. 1-3, 20); receptive speech goals (Stip. Ex. 12, pp. 198-199) (Resp. Ex. 251, pp. 4-8); summer progress (Resp. Ex. 154; Pet. Ex. 114; Pet. Ex. 29; and Resp. Ex. 51).
- 274. No progress report was due yet for the Fall 2015 at the time stopped attending WCS, but Resp. Ex. 158 identified progress made on speech goals during the Fall 2015.
- VB-MAPP to the November 2015 VB-MAPP demonstrated that a comparison of limits improved in functional language skills while enrolled in WCS specifically in the areas of tacts, independent play, listener responding, intraverbals, and spontaneous vocalization. Resp. Ex. 48; Tr. vol. 3, pp. 510-533:15.

This increase is to be viewed with caution because of the significant changes in the testing procedures for administrative of the NC EXTEND1 in 2015.

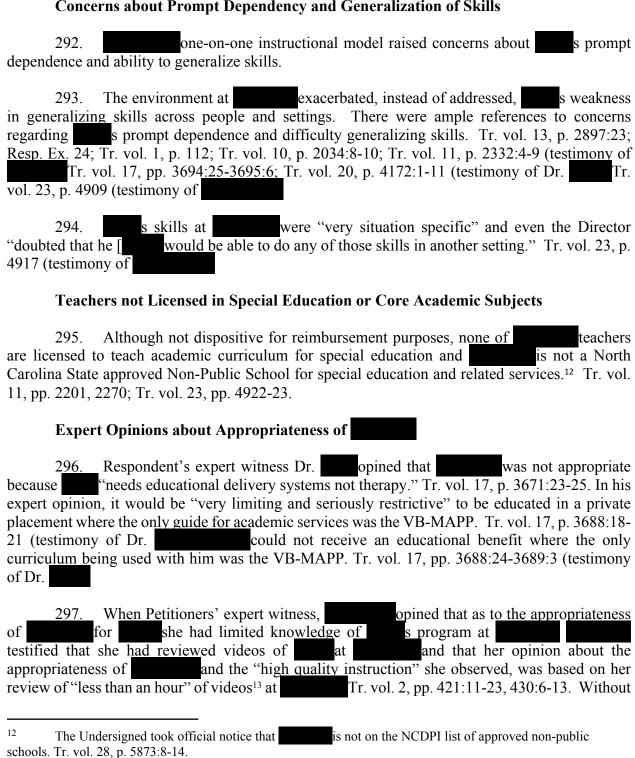




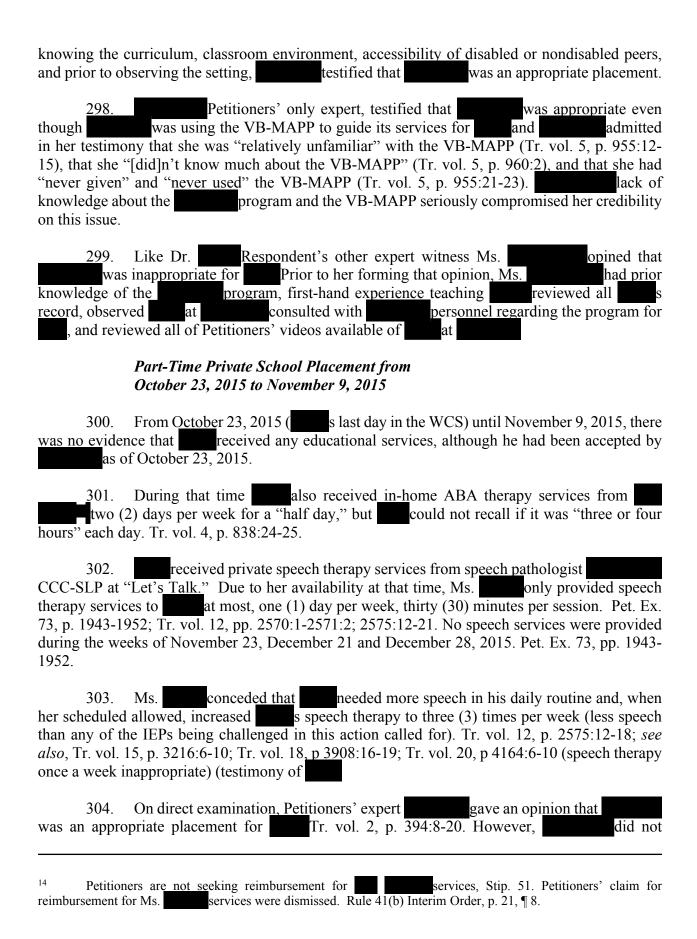
The occasional visit to the school of a 12-year-old son of a staff member during his public school track out period, was the only potential non-disabled peer interaction and there was no evidence that ever interacted with this particular peer. At best, interactions with non-disabled peers was, as described by the school director, "sporadic". Tr. vol. 11, p. 2296:18-24.

materials, kindergarten materials, these little cartoon characters and just it looked like materials I'd find in a kindergarten or a preschool." Tr. vol. 23, pp. 4905:12-4906:1.

# **Concerns about Prompt Dependency and Generalization of Skills**



No videos were ever shown to by Petitioners' counsel during direct examination. No videos were entered into evidence by Petitioners through or with anyone else in Petitioners' case-in-chief.



distinguish whether her opinion was based on a full-time placement, a part-time placement, or both. Tr. vol. 3, p. 498:4-14.

- 305. Petitioners presented no evidence to support an opinion that the part-time combination of services was appropriate or that made any progress under this arrangement from November 9, 2015 to January 11, 2016. All of Petitioners' testimony regarding the appropriateness of was premised on a full-time enrollment.
- 306. No witness gave an expert opinion that the collection of services provided to from November 9, 2015 through approximately January 11, 2016 was appropriate to meet unique needs. The service provider responsible for 6-8 hours of the service provider responsible for 6-8 hours of the service was admitted to support the appropriateness of the services she rendered. No evidence was entered to support Petitioners' claims that was appropriate without receiving any occupational therapy services, despite Petitioners' claims that direct occupational therapy services were necessary for to benefit from educational services.
- 307. The Undersigned finds that Petitioners did not meet their burden of proof and the greater weight of the evidence, presented during Petitioners' case-in-chief and in WCS case, was that the private placement from November 9, 2015 through approximately January 11, 2016 was not appropriate.

# Full Time Placement at From January 11, 2016 through January 19, 2016

- 308. Petitioners' claims for tuition reimbursement for the period from January 20, 2016 to May 17, 2016 were dismissed, as after January 20, 2016, was a parentally placed private school student to whom no FAPE obligation was owed after the expiration of the most recent IEP. *See* Interim Order dismissing Petitioner's claims from January 20, 2016 to May 17, 2016, January 4, 2017, p. 4, ¶¶ 9-10.
- 309. Given that no evidence was presented that the private placement from October 23, 2015 through approximately January 11, 2016 was appropriate, and given the dismissal of Petitioners' private school reimbursement claims from January 20, 2016 through the filing of the Petition on May 17, 2016, the only period for which private school reimbursement was sought available to Petitioners and for which Petitioners presented any evidence is January 11, 2016 through January 19, 2016.
- 310. Petitioners' private placement did not remedy any of the alleged deficiencies given by Petitioners as justification for unilaterally withdrawing from WCS and placing him in a private school.
- 311. Even though provides with foundational language skills based on the same VBA oriented program used by WCS, the Petitioners have proffered no evidence that requires VBA therapy exclusively in lieu of academic instruction.

all lack of math, reading, writing, science, social studies, and elective curricula is the primary reason that the Undersigned finds inappropriate for Secondary factors are slack of access to non-disabled peers and its unlicensed teaching staff. The fact that is not an approved non-public school on the NC DPI list was irrelevant in this decision.
313. Based on the above, the Undersigned finds that time and part-time private school placement for
CONCLUSIONS OF LAW
1. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.
2. This Order incorporates and reaffirms the conclusions of law and findings of fact contained in its previous Orders entered in this litigation.
Burden of Proof
3. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. <i>See Schaffer ex rel. Schaffer v. Weast</i> , 546 U.S. 49, 62 (2005). Stip. 3.
4. Suggestions, innuendoes, assumptions, and personal beliefs, without competent documentation evidence and testimony, are insufficient to meet this burden. Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Board's decisions. <i>See</i> N.C.G.S. § 115C-44(b).
Jurisdictional
5. Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them. Stip. 1.
6. Petitioners and Respondent named in this action are correctly designated. Stip. 2
7. is a "child with a disability" as that phrase is defined in IDEA, Stip. 10, and has been determined eligible for services under the IDEA. Stip. 13.
8. is domiciled within the boundaries of the Wilson County Schools, Stip. 11, and his parents reside at Carolina. Stip. 12.
9. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with

Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301; N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. Stip. 4.

- 10. Pursuant to 34 C.F.R. § 300.137(a)(i), the Office of Administrative Hearings does not have jurisdiction over any of the Petitioners' private tuition claims after January 19, 2016. No IEP Meetings were held after October 23, 2015 through the date of the Petition, May 17, 2016. Stip. 36.
- Because a due process case was not pending after the January 2015 IEP expired on January 19, 2016 and was a parentally privately placed student in Wake County not Wilson County, WCS had no obligation to develop an IEP or provide with a FAPE. *See* Order dated January 4, 2017; see also, *M.M. ex rel. D.M. v. Sch. Dist. Of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002).

# **General Legal Framework**

- 12. The IDEA is the federal statute governing education of students with disabilities 20 U.S.C. §1400 *et seq*. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301. Stip. 4.
- 13. Respondent is a local education agency receiving monies pursuant to the IDEA. Stip. 5
- 14. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations. Stip. 6.
- 15. Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition. 20 U.S.C. § 1415 (f)(3)(B); NC 1504-1.12(d). Stip. 7.

### **Professional Judgment and Deference to Educators**

- 16. The Fourth Circuit has explicitly held that, in determining whether a school provided FAPE a court "must afford great deference to the judgment of education professionals in implementing the IDEA." O.S. v. Fairfax Cty. Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015) (quotations and citation omitted). "Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." M.M., 303 F.3d at 532 (4th Cir. 2002). A reviewing court should "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides." Id.
- 17. "[C]ourts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *Rowley*, 458 U.S. 176 at 208-09 (1982). "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the

handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id*.

18. In *Endrew F*., the Supreme Court re-enforced the principle of deference to educators set forth in *Rowley* and the Fourth Circuit's jurisprudence. *Endrew F. ex rel.*, *Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017).

# **Private School Tuition Reimbursement Requirements**

19. The Supreme Court has established a two-part test to determine whether a district is required to reimburse parents for their expenditures for private school: (1) was the IEP proposed by the school district inappropriate; and, (2) was the private placement appropriate to meet the child's needs. School Committee of the Town of Burlington v. Dep't of Educ. of Massachusetts, 471 U.S. 359, 370-71 (1985). Hearing officers are empowered with "broad discretion" to award "appropriate relief," when a district fails to meet it obligation and violates a child's rights under the law. 20 U.S.C. § 1415; Burlington, 471 U.S. at 369–70. As the Court in Burlington opined, "[I]t seems clear beyond cavil that 'appropriate' relief' should avoid an "empty victory," if a school district has failed meet its obligation; otherwise, "the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." Id. The reimbursement provision of the IDEA prescribes that a school district may be required to reimburse the parents for tuition the parents paid as a result of the school district's failure to meet its obligations. Id.

#### FREE AND APPROPRIATE PUBLIC EDUCATION

#### **Substantive Appropriateness of IEPs**

- 20. An Individualized Education Program ("IEP") is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the IDEA. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a).
- 21. The IEP is "[t]he primary vehicle for implementing" the IDEA. The IEP is "[p]repared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child," and the IEP "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Honig v. Doe*, 484 U.S. 305, 311.
- 22. The IDEA requires that every IEP contain "[a] statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum," "[a] statement of measurable annual goals," and a description of "[h]ow the child's progress toward meeting the annual goals . . . will be measured." 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a)(1-3). The commentary to the federal regulations interprets these requirements to "ensure that progress toward achieving a child's annual goals can be objectively monitored and measured." 71 Fed. Reg. 46664. In addition, the IDEA requires that the goals developed are individualized, and target the

unique needs of the child. 20 U.S.C. §§ 1401(29), 1414(d)(1)(A); 34 C.F.R. § 300.39(a)(1); N.C. Policy 1500-2.34(a)(1), 1503-4.1(a).

- 23. An IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child . . . (aa) to advance appropriately toward attaining the annual goals; (bb) to be involved in and make progress in the general education curriculum . . and to participate in extracurricular and other nonacademic activities; and (cc) to be educated and participate with other children with disabilities and nondisabled children." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).
- 24. The IDEA requires school districts to review and revise a disabled "child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved." 34 C.F.R. 300.324(b)(1)(i). To make this determination, the IDEA mandates school districts to measure and periodically report each "child's progress toward meeting the annual goals." 34 C.F.R. 300.320(a)(2-3).
- 25. The appropriateness of a student's educational program is decided on a case-by-case basis, in light of the individualized consideration of the unique needs of the child. *See Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
- 26. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in <u>light of the child's circumstances.</u>" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (emphasis added).
  - 27. *Endrew F*. did not overturn, but instead further clarified *Rowley*, for students like who are not on grade level and not in mainstreamed classes.
- 28. If the IEP is developed in compliance with the procedures set forth in the IDEA and is reasonably calculated to enable the student to make educational progress appropriate in light of the child's circumstances, "the State has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 207.
- 29. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*, 458 U.S. at 189-90. A district is not required to maximize a student's educational performance. *See e.g. Rowley*, 458 U.S. at 188-89 (1982); ex rel. D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir.2004); and Hartmann v. Loudoun County Bd. of Educ., 118 D.3d 996, 1001 (4th Cir. 1997) (quoting Rowley, 458 U.S. at 199-200).
- 30. The public school district satisfies this test if it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (*quoting Rowley*, 458 U.S. at 203); *see also, Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987) (underscoring the

notion that a free and appropriate education "does not mean that a local school board must provide the most appropriate education for each child.").

- I. Whether Respondent provided a FAPE based on the January 14, 2014 IEP as amended on February 27, 2014 (collectively the "January 2014 IEP") from December 16, 2014, through January 19, 2015, a period of sixteen (16) school days ("January 2014 IEP FAPE" issue).
- 31. The IEP's team decisions regarding the content and development of the Present Levels, goals, progress monitoring, LRE, related services at the December 2013, January 14, 2014 and February 27, 2014 IEP meetings are outside the statute of limitations and therefore not before the Undersigned. To allow challenges to the appropriateness of these decisions prior to the start of the relevant statutory period, December 16, 2014, would essentially extend the applicable one-year statute of limitations set by N.C.G.S. §115C-109.6(b) to two years.
- 32. Nevertheless, for purposes of judicial review, based on Findings of Facts, various stipulations, and other evidence in the record, the weight of the evidence supports that the January 2014 IEP provided a FAPE during the period of December 16, 2014 through January 19, 2015; and, even assuming *arguendo* that the January 2014 IEP was inappropriate, the Petitioners have failed to show any educational harm that resulted during the implementation period of sixteen (16) days.
- 33. Based on Findings of Fact 1-5, 40-127, 249-256, 262-277, various stipulations, and other evidence in the record, the weight of the evidence supports that the January 2014 IEP was reasonably calculated to enable to make progress appropriate in light of his circumstances and provided a free appropriate public education in the least restrictive environment.
  - II. Whether Respondent provided with a FAPE based on the January 20, 2015 IEP as amended June 9, 2015 (collectively the "January 2015 IEP") from January 20, 2015, through January 19, 2016 ("January 2015 IEP FAPE" issue).

# Appropriateness of Present Levels, Goals, Objectives, and Supplemental Aids and Services

- 34. Based on Findings of Fact 1-3, 6-8, 40-102, 128-277, various stipulations, and other evidence in the record, the weight of the evidence supports that the January 2015 IEP drafted on January 20, 2015 was reasonably calculated to enable to make progress appropriate in light of his circumstances and provided a free appropriate public education in the least restrictive environment from January 20, 2015 until the end of the 2014-2015 school year.
- 35. Based on Findings of Fact 1-3, 6-8, 40-102, 128-277, various stipulations, and other evidence in the record, the weight of the evidence supports that the January 2015 IEP drafted on January 20, 2015, was reasonably calculated to enable to make progress appropriate in light of his circumstances but, from August 24, 2015 through January 19, 2016 was not afforded sufficient access to his non-disabled peers as explained in the LRE Issue, *infra*.

# **Occupational Therapy Related Services**

- 36. Petitioners objected to the provision of occupational therapy in a supportive mode rather than direct therapy. The IDEA defines related services as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34(a). These services include "speech-language pathology and audiology services, psychological services, [and] physical and occupational therapy." 34 C.F.R. § 300.34(a).
- 37. Occupational therapy means services provided by a qualified occupational therapist for improving, developing or restoring impaired function, improving ability to perform tasks for independent functioning, and preventing further impairment or loss of function. 34 C.F.R. § 300.34(a)(6).
- 38. Petitioners failed to meet their burden by a preponderance of the evidence that direct occupational therapy, rather than supportive services, was necessary for FAPE.
- 39. Based on Findings of Facts 249-256, various stipulations, and other evidence in the record, the weight of the evidence supports that consultative occupational services were appropriate to assist to benefit from his special education.

#### **Behavior Intervention Plan**

- 40. The IDEA does not require the use of a specific written "behavior intervention plan" except in cases of a disciplinary change in placement. See 1415(k)(1)(F); 34 C.F.R. § 300.324(a)(2)(i); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 25 (1st Cir. 2008) ("The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."). Rather, the statute requires that the IEP team "consider the use of positive behavior interventions and supports" for a "child whose behavior impedes the child's learning or that of others." 20 U.S.C. § 1414(d)(3)(B). There is no requirement that every behavioral response or strategy be reduced to a written plan. See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015), cert. granted, 137 S. Ct. 29, 195 L. Ed. 2d 901 (2016); Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766-67 (8th Cir. 2011); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 26 (1st Cir. 2008); Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1011 (8th Cir. 2006).
- 41. Petitioners provided no evidence or authority for the requirement of a BIP outside of a disciplinary change in placement, which is not alleged to have occurred in this case. The IEP team's decision not to develop a behavior plan for was supported by substantial evidence in the form of testimony by SWCS teachers, the Director of and Ms. Such that see that see that see the provided was supported by substantial evidence in the form of testimony by SWCS teachers, the Director of such and Ms. Such that see that see the provided was supported by substantial evidence in the form of testimony by SWCS teachers, the Director of such and Ms. Such that see that support of the supp

42. Based on Findings of Fact 41, 78, 257-261, various stipulations, and other evidence in the record, Petitioners failed to prove by a preponderance of the evidence that Behavior Intervention Plan or additional functional behavior assessment for a FAPE.

# **Procedural Appropriateness of IEPs**

- 43. The IDEA contains a number of critical, procedural safeguards to provide notice to parents of decisions regarding their children and "an opportunity [for parents] to object to those decisions." *G. ex rel. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 299 (4th Cir. 2003) (quoting MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 527 (4th Cir. 2002) (internal citation omitted)). Should the LEA fail in its obligations under the IDEA, parents are afforded the right to file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).
- 44. For a procedural defect in the development of an IEP to entitle a claimant to relief, the defect must result in a loss of educational benefit and not simply be a harmless error. See A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 684 (4th Cir. 2007). To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir.1990); see also, N.C. Gen. Stat. § 115C-109.6(f).
- 45. "In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. 115C-109.8 (a).

#### **Prior Written Notices**

- 46. Petitioners contend that the Prior Written Notices for the relevant IEPs were procedurally defective.
- 47. The IDEA requires that the Prior Written Notice include: a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a description of other options considered by the IEP Team and the reason why those options were rejected; and, a description of the factors that are relevant to the agency's proposal or refusal. 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b).
- 48. Regardless of whether all team members agree to the change, the agency must provide notice as it "allows the parent time to fully consider the change and determine if he/she

has additional suggestions, concerns, questions, and so forth." *Letter to Lieberman*, Office of Special Education and Rehabilitative Services (Aug. 15, 2008).

- 49. Based on Findings of Fact 243-248, other findings, the above conclusions and other evidence in the record, with respect to the Prior Written Notice from the June 9, 2015 IEP meeting only, this PWN was defective when it failed to fully inform the Petitioners that would no longer have access to non-disabled peers during the day and failed to include a transition period thereby denying Petitioners and A.D. meaningful participation in the IEP process.
  - III. Whether had appropriate access to non-disabled peers from August 24, 2015 through October 23, 2015 ("LRE" issue).

#### **Least Restrictive Environment**

- 50. In addition to IDEA's requirement that the state provide each student with educational benefit, the student must be placed in the least restrictive environment ("LRE") appropriate for the student to achieve educational benefit. See, e.g., ex rel. D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004); MM ex rel. DM v. Sch. Dist. Of Greenville County, 202 F.3d 523, 526 (4th Cir. 2003); see also, Devries v. Fairfax Cnty. Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989) ("The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate.").
- 51. The IDEA clearly articulates a presumption that disabled children will not be segregated from their nondisabled peers and will be educated in the least restrictive environment to the maximum extent appropriate. 20 U.S.C. § 1412(5)(A); see 34 C.F.R. § 300.114(a).
- 52. The school district may consider "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment . . . *only if* the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii) (emphasis added).
- 53. Although the IEP team members agreed that benefited from his social interactions with his nondisabled peers, it further segregated him in middle school for administrative convenience.
- 54. Based on Findings of Fact 41, 78, 223-248, other findings, the above conclusions and other evidence in the record, Petitioners met their burden that the June 9, 2015 amendment to the January 2015 IEP which further restricted as access to nondisabled peers from August 24, 2015 to October 23, 2015 was inappropriate and denied as FAPE.

- IV. Whether Respondent failed to properly implement service needs between December 16, 2014, and January 19, 2016 and, if so, whether this failure caused services" issue).
- 55. The failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, a failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011). See also, Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir.2007) ("[A] material failure to implement an IEP violates the IDEA."); Neosho R–V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n. 3 (8th Cir.2003); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir.2000) ("[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.").
- 56. "A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770, 780 (9th Cir. 2007). In order to find a "material failure," the child does *not* have to "suffer demonstrable educational harm in order to prevail; [h]owever, the child's educational progress, or lack of it, may be probative of whether there has been a significant shortfall in the services provided." *Id.*
- 57. Based on Findings of Fact 35-39, 189-197, other findings, the above conclusions and other evidence in the record. Petitioners have not proved by a preponderance of the evidence that the Respondent failed to implement substantial or significant provisions of the January 2014 IEP except for speech services which were later provided in the summer of 2015.
- 58. Based on Findings of Fact 35-39, 189-197, other findings, the above conclusions and other evidence in the record. Petitioner proved by a preponderance of the evidence that from August 24, 2015 to October 23, 2015 Respondent failed to implement a material portion (21%) of speech services required by his January 2015 IEP.
  - V. Whether Respondent failed to conduct required evaluations of from December 16, 2014, and January 19, 2016 and, if so, whether this failure caused educational harm ("Evaluation" issue).
- 59. Petitioners contend that WCS failed to conduct all necessary reevaluations, specifically cognitive testing and a behavior assessment. The reevaluation decision predates the relevant statutory period but to the extent that Petitioners contend that ongoing reevaluations should have been done during the relevant for appropriate educational programming, the Undersigned will make provisional conclusions on this issue for judicial review purposes.
- 60. An LEA must ensure that a reevaluation of each child is conducted at least once every three years, unless the parent and LEA agree that a reevaluation is unnecessary. 34 C.F.R. 300.303(b)(2); 20 U.S.C, § 1414 (a)(2).

- 61. signed the Consent for Reevaluation Form ("DEC2") on October 24, 2013 for educational and speech/language (Verbal Behavior Analysis) reevaluations. Stip. Ex. 8, p. 45. She also acknowledged receipt of the *Handbook on Parent's Rights* that explains the due process procedures on that form. *Id*.
- 62. If she disagreed with the evaluations selected or requested additional evaluations, she could have specifically stated that on the Reevaluation DEC 7 form under the section which states: "I **disagree** with the IEP Team decision to obtain no additional assessment information concerning my child. I request that additional assessment(s) be completed prior to determining continued eligibility." Stip. Ex. 8, p. 46 (emphasis in original).
- and no additional testing was required. WCS complied with the requirements of 34 C.F.R. § 300.305(d) by providing with a DEC 5 and a DEC 7, after the January, 2015 IEP meeting, both of which notified that needed an evaluation for fine motor/gross motor skills. Stip. Ex.12, pp. 216, 220-22. Pursuant to 34 C.F.R. § 300.305(d)(2), "[t]he public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents." As agreed with this reevaluation decision, WCS was not required to conduct additional assessments.
- 64. Based on Findings of Fact 42-48, 78, 198-222, 257-261, other findings, the above conclusions and other evidence in the record, Respondent conducted the required evaluations of and Petitioners failed to meet their burden on this issue.

#### **Educational Progress**

- 65. While evidence of actual progress may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit, "progress, or the lack thereof, while important, *is not dispositive.*" *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (emphasis added).
- 66. This is because the "benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Endrew F.*, 2017 WL 1066260, at \*10 (Mar. 22, 2017) (quoting *Rowley*, 458 U.S. at 202). "One child may have little difficulty competing successfully in an academic setting with [nondisabled] children while another child may encounter great difficulty in acquiring even the most basic self-maintenance skills." *Rowley*, 458 U.S. 176, 202 (1982).
- 67. The appropriateness of an IEP is "judged prospectively so that any lack of progress under a particular IEP, assuming *arguendo* that there was no progress, does not render that IEP inappropriate." *Carlisle Area Sch. v. Scott P. By & Through Bess P.*, 62 F.3d 520, 530 (3d Cir. 1995).

- 68. Based on Findings of Fact 79-98, 262-277, other findings, the above conclusions and other evidence in the record, Petitioners failed to prove so rate of progress; therefore, Petitioners have not met their burden by a preponderance of the evidence that did not make progress appropriate to his circumstances during this relevant period in this contested case.
  - VI. If Respondent denied FAPE, whether the private placement chosen by Petitioners from October 23, 2015 through January 19, 2016 was appropriate ("Private Placement" issue).

# **Appropriateness of Private School Placement**

- 69. The appropriateness of a unilateral private placement is a subsequent consideration that requires the Petitioners to first establish that the program offered by the Respondent was legally insufficient. M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd., 553 F.3d 315, 324 (4th Cir. 2009).
- 70. Since Petitioners met their burden as to the related service and LRE issues during the Fall 2015, the appropriateness of must be addressed.
- 71. Parents who "unilaterally change their child's placement...without the consent of state or local school officials, do so at their own financial risk." *Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993). Parents challenging an IEP are entitled to reimbursement only if the Court "concludes both that the public placement violated IDEA and the private school placement was proper under the Act." *James M. ex rel. Sherry M. v. Hawai'i*, 803 F. Supp. 2d 1150, 1157 (D. Haw. 2011) (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009)).
- 72. Petitioners seeking reimbursement bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate. *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000). Unlike a public school receiving funding under the IDEA, private schools are not required to meet the IDEA's definition of a FAPE, 20 U.S.C. § 1401(9), or attain state education standards in order to be deemed appropriate. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 7 (1993); *R.E.*, 785 F. Supp. 2d at 44 (citing *Frank G.*, 459 F.3d at 364).
- 73. For reimbursement to be available, Petitioners must prove that their unilateral private placement is appropriate to meet the student's needs. *See M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009) (quoting *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir.1991) (holding that like an IEP, a parental placement is appropriate if it is 'reasonably calculated to enable the child to receive educational benefits.').
- 74. Respondent asserts that is inappropriate because it is not least restrictive. The Fourth Circuit has "never held that parental placements must meet the least restrictive environment requirement." *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009). Rather, the IDEA's mandate that "children with disabilities . . . are educated with children who are not disabled," 20 U.S.C. § 1412 (a)(5)(A), is simply a factor when considering the appropriateness of a private school selected by the parents. *Sumter Cnty. Sch. Dist. 17*, 642

F.3d at 487–89; see also M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 327 (4th Cir. 2009) (finding the district court's consideration of the private school's restrictiveness proper "because it considered the restrictive nature only as a factor in determining whether the placement was appropriate under the IDEA, not as a dispositive requirement")

- 75. The IDEA provides various scenarios where a reimbursement claim *may* be reduced or denied. 34 C.F.R. § 300.148(d)(1-3). The Undersigned has determined that the Petitioners gave sufficient notice at the October 23, 2015 *de facto* IEP meeting. Moreover, the Undersigned finds no "unreasonableness with respect to actions taken by the parents." 34 C.F.R. § 148(d)(3).
- 76. Based on Findings of Fact 278-313, and other evidence in the record, Petitioners have failed to prove by a preponderance of the evidence that the program, either part-time or full-time, was appropriate to meet unique academic and functional needs. Petitioners presented treatment plans but no educational plans from and plans has no academic curriculum for the lack of related services provided at a contributes to its inappropriateness. Moreover, provided no access to non-disabled peers, or even age appropriate disabled peers. The combination of these factors made inappropriate.
- 77. Although VBA was part of seducational plan in WCS, Petitioners failed to present evidence that required an exclusive program of VBA therapy as provided by to receive appropriate educational benefit.
- 78. The Undersigned concludes that was not an appropriate private school placement; therefore, tuition reimbursement is not a viable remedy in this case.

### **Other Issues:**

#### **Progress Monitoring**

- 79. Petitioners solicited evidence regarding Respondent's alleged failure to keep some monitoring data, specifically social skills data from the 2014-15 school year. Petitioners provided no authority for an obligation to maintain such data.
- 80. IDEA does not expressly require the Respondent to maintain records of the kind described by in the testimony. Neither the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g) et seq. nor the IDEA requires school districts to maintain the type of raw data for progress monitoring that Ms. and Ms. described. Ms. described that the raw data was used to draft the present level of performance and the goal related to the data. The records that Ms. described are not records which the LEA was required to maintain once progress reports had been distributed.
- 81. There were "constant communications" between the parents and the school staff both through face-to-face meetings, emails, communication logs, and data sheets such that any gaps in the IEP progress monitoring did not inhibit the parents from meaningful participation.

Based on Findings of Fact 249-256, other findings, the above conclusions and other evidence in the record, to the extent that the destruction of these records or inadequate progress monitoring constitutes a procedural violation, Petitioners have not met their burden of providing that the violation impeded so right to a FAPE, significantly impeded or sopportunity to participate in the decision making process or caused a deprivation of educational benefit to
Other Claims
83. To the extent that this Order does not expressly rule on any other claims raised in the Petition, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims.

# VII. To what remedies, if any, are Petitioners entitled?

84. Since has been deemed an inappropriate private school placement, the Petitioners are not entitled to private school tuition reimbursement. Because Petitioners did not propose alternative remedies at the hearing, the Undersigned, based on the broad discretion afforded hearing officers, has fashioned remedies appropriate in her estimation. These remedial violations of FAPE are detailed below in the Final Decision.

**THEREFORE**, the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.

### **FINAL DECISION**

The Undersigned is mindful of the challenges faced by the Petitioners and was impressed throughout the hearing with Petitioners, and who are extremely involved parents, in seeking the best of all things that they possibly can for

Through IDEA, Congress seeks to improve educational results for children with disabilities and provide assistance through the Act to a FAPE for all disabled children. The Act does not, however, require that States do whatever is necessary to achieve a particular level of education, but calls for an individualized education program reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances.

# BASED upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 1. Petitioners proved by a preponderance of the evidence that the Respondent failed to implement all speech therapy sessions, failed to provide a legally sufficient Prior Written Notice on June 9, 2015, and failed to ensure access to his nondisabled peers from August 24, 2015 through October 23, 2015.
  - 2. Petitioners are prevailing party only as to the claims listed above.
- 3. Petitioners failed to meet their burden by a preponderance of the evidence on all other issues and claims in this matter and those shall be dismissed. Respondent is prevailing party on all other issues in this Final Decision and those claims dismissed in prior orders.

#### IT IS HEREBY ORDERED THAT:

- 4. Petitioners are entitled to seven (7) sessions, 25 minutes per session (175 minutes), of compensatory speech therapy. Respondent will reimburse the Petitioners the equivalence of this amount of speech therapy previously provided by the Petitioners' private speech therapist.
- 5. Petitioners are also entitled to compensatory social skills training to remedy the Respondent's denial of FAPE in the LRE from August 24, 2015 to October 23, 2015, a period of approximately nine (9) weeks. Respondent shall contract with a private speech pathologist, of Petitioners' choice, to provide social skills training in a group setting for 3 sessions weekly of 30 minutes duration per session for a period of 9 weeks This is a total of 27 sessions (13.5 hours), or its equivalence as agreed upon by the parties.
- 6. If social skills training in a group setting is not available, then the Respondent shall contract with a private speech pathologist, of Petitioners' choice, to provide speech language services that specifically focuses on social skills and pragmatic language for 3 sessions weekly of 30 minutes duration per session for 9 weeks, a total of 27 sessions (13.5 hours), or its equivalence as agreed upon by the parties.

#### IT IS FURTHER ORDERED THAT:

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that any remaining claims of Petitioners are **DISMISSED WITH PREJUDICE**.

### IT IS SO ORDERED.

### **NOTICE**

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

This the 21st day of July, 2017.

Stacey Bice Bawtinhimer Administrative Law Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Rachel Blevins Hitch Schwartz & Shaw, P.L.L.C. rhitch@schwartz-shaw.com Attorney For Respondent

Kristopher Caudle Schwartz & Shaw, PLLC KCaudle@schwartz-shaw.com Attorney For Respondent

Stacey M Gahagan
The Gahagan Law Firm, P.L.L.C.
<a href="mailto:stacey@gahaganlaw.com">stacey@gahaganlaw.com</a>
Attorney For Petitioner

Bill Elvey
NC Department of Public Instruction
due\_process@dpi.nc.gov
Affiliated Agency

This the 21st day of July, 2017.

Lisa J Garner

North Carolina Certified Paralegal Office of Administrative Hearings 6714 Mail Service Center

Lisa f. Garner

Raleigh NC 27699-6700 Telephone: 919-431-3000